(1)
Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

SODEXHO MARRIOT SERVICES, INC.,

Petitioner,

v.

CYNTHIA CARTER McREYNOLDS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GEORGE W. JOHNSTON
TODD J. HORN*
MITCHELL Y. MIRVISS
VENABLE, BAETJER AND HOWARD, LLP
1800 Mercantile Bank & Trust Bldg.
Two Hopkins Plaza
Baltimore, Maryland 21201
(410) 244-7400

Attorneys for Petitioner

* *Counsel of Record*

180803

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTION PRESENTED

A decision to certify a putative class often constitutes the single most significant event in deciding the outcome of a class action lawsuit, as commentators and many in Congress have recognized. Fed. R. Civ. P. 23(f) was promulgated in 1998 so that significant class certification decisions could be appealed and reviewed before trial to ensure uniformity of decisions and prevent significant errors.

In this massive employment discrimination case, the district court certified a nationwide class of managerial and executive level employees despite, as the court admitted, the lack of a direct precedent and without providing the defendant an opportunity to rebut plaintiffs' statistical evidence and anecdotal claims. The D.C. Circuit denied defendant's petition for interlocutory appeal, applying a standard that limits Rule 23(f) appeals to rare cases.

This petition therefore raises a critical question regarding class action procedure that has sharply divided the circuits:

> Do the circuit courts of appeal have discretion to limit their grant of interlocutory appeals under Fed. R. Civ. P. 23(f) to those rare class certification decisions that present (i) manifest error by the district court, (ii) an unsettled fundamental issue of law that is likely to evade end-of-the-case review, or (iii) a "death knell" impact terminating the case?

PARTIES AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Sodexho Marriott Services, Inc., now Sodexho, Inc. ("Sodexho"), is the defendant in the district court proceedings below. Respondents Cynthia Carter McReynolds, et al. are current and former management-level employees of Sodexho and its two predecessor corporate entities, Marriott Management Services ("MMS"), a former division of Marriott International, Inc., and Sodexho U.S.A. ("SUSA"), a former division of Alliance Sodexho, S.A. Ten named plaintiffs brought this action: Ms. McReynolds, Lisa Mitchell, Robert Morris, Jr., Chip Moss, Marilyn McNish, Ezzie L. Henry, Dwain P. Richardson, Tarsha Ann Hardy, Gail L. Darlington, and Samuel Cokes. Their motion for class certification sought certification of a class of all African American salaried employees of Sodexho, MMS, and SUSA at any time from March 9, 1998 to December 7, 2001 who have held or sought managerial level positions.

Pursuant to Rule 29.6, Sodexho certifies that it is a wholly owned subsidiary of Sodexho Alliance, S.A., a publicly held company. No other publicly held company holds 10% or more of its stock. Sodexho may have indemnity coverage for at least some of the claims and potential damages sought by plaintiffs through an EPLI insurance policy with the Federal Insurance Company, a subsidiary of The Chubb Corporation, which is publicly traded. No other publicly traded company is financially interested in the outcome of the proceeding.

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Sodexho respectfully petitions for a writ of certiorari to review a decision by the United States Court of Appeals for the D.C. Circuit denying Sodexho's Fed. R. Civ. P. 23(f) petition to appeal an order of the United States District Court for the District of Columbia certifying a class for liability purposes.

OPINIONS BELOW

The ruling of the Court of Appeals denying Sodexho's Rule 23(f) petition is unreported and is reprinted at Appendix A (App. 1a-2a). The memorandum opinion of the district court granting plaintiffs' motion for class certification is reported at 208 F.R.D. 428 (D.D.C. 2002) and is reprinted at Appendix B (App. 3a-52a). The order of the district court certifying the class is unreported and is reprinted at Appendix B (App. 53a-54a).

STATEMENT OF JURISDICTION

The Court of Appeals denied Sodexho's Rule 23(f) petition on February 25, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1). Plaintiffs asserted original jurisdiction in the district court pursuant to 42 U.S.C. § 2000e-5(f) and 28 U.S.C. §§ 1331, 1343, 2201, and 2202.

RULE INVOLVED

Rule 23 of the Federal Rules of Civil Procedure is printed at Appendix C (App. 55a-59a).

STATEMENT OF THE CASE

In *General Telephone Co. v. Falcon*, 457 U.S. 147, 161 (1982), this Court held that district courts must conduct a "rigorous" analysis of claims for class certification under Rule 23. In applying *Falcon* in this case, the district court did not allow Sodexho to challenge or rebut plaintiffs' evidence, reflecting one side of a wide gulf among the lower courts as to whether, and to what extent, *Falcon* requires deferential judicial review of class allegations. Pursuant to Rule 23(f), Sodexho petitioned the D.C. Circuit to consider that and other important and unsettled issues of law concerning the use of class actions in employment discrimination cases. The D.C. Circuit declined to hear the appeal, applying a standard under which that court and the Second Circuit "rarely" grant Rule 23(f) appeals.

The case involves the certification of a nationwide class of 2,600 current and former African American managerial employees – including top-level management – in an employment discrimination action against the largest food and facilities management corporation in the United States. Ten named plaintiffs claim that decentralized and subjective promotion practices at more than 5,000 job sites in 47 states discriminate against African American managers. This case apparently is one of the largest employment discrimination class actions regarding promotions of managerial-level employees ever brought against a private employer.

Sodexho was formed on March 28, 1998 through a merger of MMS, a division of Marriott International, Inc., and SUSA, a division of Sodexho Alliance, S.A., into Sodexho Marriott Services, Inc., a publicly-traded company listed on the New York Stock Exchange. Due to this merger's

size and complexity, the MMS and SUSA sides of Sodexho did not integrate payroll and accounting systems, salary grades and personnel policies until early 2000.

Sodexho is a massive company with six autonomous divisions, each itself the size of a significant corporation. As of November 2001, it employed over 110,000 individuals. App. 4a, 208 F.R.D. at 431. The company is largely decentralized. Its six distinct divisions function like wholly-owned subsidiaries, each with its own unique culture and identity. Each division keeps its own accounting records, issues its own internal financial reports, maintains its own human resources department, and, except at the highest levels of executive management, makes its own independent promotion decisions. Within these six divisions, there is a total of approximately **155 separate geographic regions** dispersed nationwide that have significant autonomy in personnel decisions, including the selection of mid-level managers. The regions service **5,000** local accounts, spread over an even greater number of sites.

The scope of the proposed class action is therefore staggering. Plaintiffs challenge promotion decisions made by literally thousands of decision-makers (there were **5,436** local General Managers and **486** regional District Managers during the class limitations period) unconnected by any allegedly discriminatory policy or common purpose other than their substantial autonomy in decision-making and their alleged use of subjective criteria.

The ten named plaintiffs brought this action on March 9, 2001, claiming that Sodexho's promotion policies violated Title VII and related civil rights statutes under disparate impact and treatment theories. They complained that they

are segregated into certain units, denied promotion opportunities to higher-level management positions, underrepresented at higher pay band levels, harassed, and discriminated against in training, discipline, compensation, termination, and performance reviews. Their complaint sought equitable remedies, back pay, front pay, compensatory damages, and punitive damages for the class, which, given plaintiffs' avowed intention to seek the maximum $300,000 compensatory and punitive damages award permitted by Title VII, would total close to ***$1 billion*** in damages ***plus*** back and front pay.[1]

After a period of class-related discovery, plaintiffs moved for class certification in December 2001. Their motion rested upon the named plaintiffs' limited anecdotal accounts of alleged instances of discrimination, corroborating evidence by several putative class members and a single white supervisor, an industrial expert's critique of Sodexho's promotion practices, and a statistical analysis by another expert, Dr. Bernard Siskin. Based upon a statistical analysis of 10,000 promotion decisions concerning Sodexho's managerial positions during a five-year span (1995-2001) rather than the three-year limitations period (March 1998-2001), Dr. Siskin found a shortfall of approximately 250 promotions for African Americans. He ignored numerous factors that could account for promotion decisions for managerial-level employees, *e.g.*, prior experience, education, or part-time status. The report also failed to assess whether the shortfall was national in scope or was limited to particular divisions, regions, or local operating units.

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1. At deposition, certain named plaintiffs reaffirmed their intent to pursue maximum damages, but, in the proceedings below, plaintiffs tried to distance themselves from that testimony. They offered no evidence that their claims were lower, however, nor did they provide an estimate of their actual demand.

In response, Sodexho proffered extensive evidence of its aggressive pursuit of affirmative action and improved internal promotion policies since the merger. Its Senior Vice President of Human Resources is African American, as was his predecessor. Based in part on his initiatives, which plaintiffs castigate as discriminatory, African American representation in the company stands at 12.2%, well in excess of labor force availability, and has improved since the merger. Sodexho's employment practices have been reviewed numerous times by the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") and have repeatedly received a clean bill of health. The OFCCP recently conducted a comprehensive review of Sodexho's headquarters division, assessing many of the same promotional results attacked by plaintiffs, and found ***no*** evidence of discrimination.

Sodexho also proffered expert evidence from Dr. Joan Haworth, who serves as the *district court's* neutral expert in massive *Amtrak* class action litigation pending in the same court. She demonstrated that, even under Dr. Siskin's flawed methodology, his own back-up data (which he conspicuously failed to analyze in his report) found ***no statistically significant adverse promotion results in four of Sodexho's six divisions***. Indeed, only ***9 of Sodexho's approximately 155 regions*** – a mere 6% – had statistically significant adverse results. In other words, plaintiffs' own evidence demonstrated that any alleged problems were localized.

In addition to pointing out the exculpatory impact of Dr. Siskin's unreported data, Dr. Haworth applied a much more accurate regression analysis. Unlike what Dr. Siskin indicated in his report, Dr. Haworth accounted for division, geography, and other factors. That more refined analysis

showed that only ***2 to 3 of those approximately 155*** regions had statistically significant negative results for African Americans.[2]

Dr. Haworth also demonstrated, and plaintiffs did not dispute, that the representation of African American class members in most divisions ***exceeded*** their labor market availability. Indeed, at high-level pay bands, where discrimination supposedly was the most rife, African American representation at ***all*** of Sodexho's divisions was consistent with availability.

Finally, Dr. Haworth assessed whether use of Sodexho's systems for posting job vacancies (a focus of plaintiffs' case) had discriminatory impact, and she found none.

None of this objective evidence was considered by the district court, which cited decisions emanating from *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), as requiring it to accept as true all facts alleged by plaintiffs and to ignore Sodexho's evidence to the contrary. *See* App. 4a-5a, 208 F.R.D. at 431 (stating that "the Court will assume the facts as set forth by plaintiffs"). That unquestioning acceptance of plaintiffs' facts led the district court to critical errors.

For example, the court treated Sodexho as if it were a monolithic, static entity notwithstanding decentralization and

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2. ***None*** of the named plaintiffs worked in regions that either expert had found to have statistically significant adverse results. Many worked in a region with significantly ***favorable*** promotion results: 29% of the promotions in that region went to African Americans. Ironically – and tellingly – that is the same region in which most of the anecdotal instances of discrimination cited by plaintiffs supposedly occurred.

the merger of two unrelated corporations at the outset of the limitations period. It concluded that Sodexho's system for posting vacancies and making promotion decisions is the same as that MMS used in 1994, even though that system was replaced in 2000 (and was never used by SUSA).[3] And it ignored clear evidence of intra-class conflicts arising from the fact that the named plaintiffs and other class members are themselves members of the very management structure that they allege has discriminated against them – a clear ground for rejecting the class under settled D.C. Circuit precedent.[4]

The district court's treatment of the statistical evidence was equally one-sided. Applying Second Circuit precedent,

3. Three years ago, well within the class limitations period, Sodexho closed its system for posting job vacancies that it had inherited from Marriott in favor of a new "Career Center" posting system that imposes mandatory written procedures, including written job descriptions with objective criteria for selection (such as experience and education), review of all job postings by human resources personnel, and disciplinary action for non-compliance. The district court never considered the newer system. *See* App. 8a-9a, 33a & n.18, 208 F.R.D. at 432-33, 441 & n.18.

4. Even though named plaintiffs testified to specific and discrete adverse decisions made by other class members, including denials of promotions, the court summarily dismissed these conflicts as abstract and unproven. *See* App. 47a-48a, 208 F.R.D. at 447. Their testimony was not, however, ambiguous or confusing. For instance, named plaintiffs McReynolds and Moss each passed over named plaintiff McNish for promotions in decisions that McNish alleges are discriminatory. Named plaintiffs Morris and McNish each alleged instances in which putative class members denied them promotions in favor of white individuals. Plaintiff Howell alleges that an African American supervising manager gave a discriminatory performance evaluation and wrongfully eliminated her job.

the court held that it could not consider Sodexho's statistical evidence or Dr. Haworth's critique of Dr. Siskin's analysis, as that would constitute a battle of experts inappropriate for Rule 23 analysis. Instead, the only consideration was whether plaintiffs' statistical evidence satisfied the minimum requirements for ***admissibility***. *See* App. 38a, 208 F.R.D. at 443 (refusing to pass on the merits of plaintiffs' statistical evidence and instead considering only whether that evidence was "'so incomplete as to be inadmissible as irrelevant'") (quoting *Caridad v. Metro-North Commuter R.R. Co.*, 191 F.3d 283, 292 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000)). Because Dr. Siskin's report satisfied that minimal threshold, the court never addressed the fact that even his data and methodology showed that any statistically significant instances of discrimination were narrowly concentrated in tiny pockets of discrete geographical regions and divisions. In essence, the court permitted Sodexho to mount a bare-bones *Daubert*-type challenge to Dr. Siskin's opinion, but nothing more, making certification a foregone conclusion.

Not surprisingly, under this liberal standard, the court found plaintiffs' proffer sufficient to meet the commonality and typicality tests of Rule 23(a) and certified a class for liability purposes only.[5] Instead of conducting a rigorous analysis as required by *Falcon*, the court certified a nationwide class based upon the shakiest of foundations: (1) limited anecdotal evidence largely emanating from one of the 155 regions; (2) Dr. Siskin's finding of a "shortfall"

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5. Rather than address the overwhelming problems that it would face in assessing damages and determining back pay for such an enormous class, the court deferred any consideration of whether the class could satisfy the requirements of Rule 23(b)(2) or (b)(3) as to remedy. *See* App. 50a-52a, 208 F.R.D. at 448-49. Thus, the court never determined whether plaintiffs' claims as a whole satisfy Rule 23(b).

of some 250 promotions for African Americans out of 10,000 promotion decisions made in 1995-2001 (far beyond the 3-year limitations period) without controlling for geography, experience, education, or other critical factors; and (3) Sodexho's use of allegedly subjective criteria and decentralized processes for upper-level promotions.

It is no exaggeration to say that the district court's decision holds dire implications for challenges to the promotion record of any large national corporation. A nationwide class of 2,600 managerial employees was certified because plaintiffs' expert found that African American managers are underrepresented at higher pay scales when compared to white managers with comparable dates of hire. Until now, such allegations of glass-ceiling obstacles to upper-level management positions have never been held to permit a massive class action absent proof that the barriers to promotion emanate from discriminatory policies, rather than job-related selection decisions or other exogenous factors. And, until now, no nationwide class has been certified without proof that nationwide discrimination occurred.

Under the district court's analysis, evidence of purported minority under-representation in upper-level management positions anywhere in a national corporation may trigger class certification if it is not explained by seniority and if it is coupled with anecdotal evidence of discriminatory treatment and subjective promotion criteria. Plaintiffs need not demonstrate statistically significant labor market availability; account for education, prior experience, or other factors affecting promotion decisions; or produce evidence of corporate-wide discriminatory policies or practices.

Such a momentous decision warrants careful appellate consideration, and Sodexho therefore timely petitioned the D.C. Circuit for leave to pursue an interlocutory appeal pursuant to Rule 23(f). The petition raised several important and unsettled issues of law:

- Whether *Falcon* permits a district court to rely upon statistical analyses and anecdotal evidence that, for all practical purposes, the defendant is not allowed to challenge or rebut – even though, under *plaintiffs'* methodology, only a small percentage of regions showed statistically significant adverse results?

- Whether the existence of decentralized and subjective decision-making in deciding promotions for managerial and executive-level employees could constitute a nationwide discriminatory policy sufficient to satisfy the commonality requirement of Rule 23(a)(2)?

- Whether named plaintiffs are adequate class representatives if they (or other class members) allege discriminatory treatment by other class members?

- Whether a district court may certify a class for liability purposes only, without determining that the remedies sought by the class satisfy Rule 23(b)?

The D.C. Circuit denied this petition in a per curiam order stating that Sodexho had failed to demonstrate an unsettled fundamental issue of law that is likely to evade end-of-the-case review. App. 1a-2a. This standard, obviously, is nearly impossible to meet, requiring proof of a *likelihood* that Sodexho's certification challenge would evade end-of-

the-case review. Short of a sworn declaration that it cannot afford to take the case to trial given the risk of a crippling damage award – a grave concession to make in any settlement effort – it is difficult to see how Sodexho could ever satisfy this test. Indeed, in applying virtually the same standard as in the D.C. Circuit, the Second Circuit has stated candidly that it will only "rarely" grant 23(f) requests.

This Court has never addressed Rule 23(f). In light of the significance of the district court's ruling and the sharp division among the circuits as to the appropriate standards for appellate review under Rule 23(f), this case presents a compelling opportunity for the Court to resolve that conflict.

REASONS FOR GRANTING THE PETITION

Certification is often the case-defining event in a large class action case. *See, e.g., Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) (certification "may induce a substantial settlement even if the [plaintiffs'] position is weak"); Civil Rules Advisory Comm., Minutes, Nov. 9-10, 1995 hearing, 1995 WL 870908, at *4 (J.C.U.S. 1995) ("[a] grant or denial of certification can 'make or break' the litigation"). That is especially the case here in light of the relief sought by the class – well over $1 billion arising from the purported wrongful denial of promotions among 2,600 class members. Where the stakes are so momentous, this Court should intervene and ensure that consistency among the circuits and basic common sense prevail as to the standards for interlocutory appeal of certification decisions.

A. The Conflict Among The Circuits Regarding The Standards For Granting Review Under Rule 23(f).

The D.C. Circuit's refusal to hear Sodexho's appeal is especially deserving of certiorari. Its standard for deciding whether to exercise its broad discretion to decide Rule 23(f) petitions for interlocutory appeal is virtually impossible to meet, at least as stringent as the mandamus and 28 U.S.C. § 1291 remedies that it was intended to supplant. Both the Third and Seventh Circuits have rejected the D.C. Circuit's restrictive tests.

This disparity among the Circuits was recognized by the D.C. Circuit decision that first announced the rule, *In re: Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 102-04 (D.C. Cir. 2002). There, the D.C. Circuit considered but rejected more liberal standards in favor of a test limiting Rule 23(f) appeals to cases where the petition satisfies one of three grounds: (1) the certification decision constitutes a "death-knell" for a party such that the case will not proceed further and is "questionable" on the merits; (2) it presents an unsettled and fundamental question of law that is important both to the specific case and to class actions generally and is "likely to evade end-of-the-case review"; or (3) the decision is "manifestly erroneous." *Id.* at 105. The D.C. Circuit did not rule out other circumstances but made clear that Rule "23(f) review should be granted rarely where a case does not fall within one of these three categories." *Id.*

This standard is patently unfair and wholly unrealistic. Cases with "manifest error" are rare and, in any event, remediable by mandamus. Death-knell cases and certification decisions that are likely to evade end-of-the case review are

even more rare and extraordinary. Indeed, to prove that a certification decision is likely to evade end-of-the-case review, a defendant would have to prove that it cannot afford to face the potentially devastating impact of an adverse class-wide judgment and therefore will be forced to settle the case before trial. The mere assertion of such a claim would greatly prejudice the defendant: once it publicly announces its unwillingness to risk trial, the defendant would have to negotiate settlement from a vantage of absolute weakness, having already declared a losing hand. Essentially, the defendant who seeks interlocutory appeal must accept the price that, if the appeal fails, it will likely have to capitulate to the class's demands – a risk that few, if any, Rule 23(f) petitioners would ever accept.

In essence, the D.C. Circuit has established its own death-knell rule for Rule 23(f). As of this petition, the D.C. Circuit has yet to grant a Rule 23(f) petition. *See In re Allstate Ins. Co.*, No. 02-8010, 2002 WL 31545753, at *1 (D.C. Cir. Nov. 14, 2002) (per curiam); *In re Veneman*, 309 F.3d 789, 794-96 (D.C. Cir. 2002); *In re Bioproducts, Inc.*, No. 02-8006, 2002 WL 1997993, at *1 (D.C. Cir. Aug. 29, 2002) (per curiam); *In re Rand Corp.*, No. 02-8007, 2002 WL 1461810, at *1 (D.C. Cir. July 8, 2002) (per curiam); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d at 109 (all denying Rule 23(f) petitions).[6]

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6. Contrast with cases from the following jurisdictions, all of which granted Rule 23(f) review: *Smilow v. S.W. Bell Mob. Sys., Inc.*, 323 F.3d 32, 36-37 (1st Cir. 2003); *Beck v. Boeing Co.*, 320 F.3d 1021, 1023 (9th Cir. 2003); *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 910 (7th Cir. 2003); *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 737 (7th Cir. 2003); *Sandwich Chef of Tex., Inc. v. Reliance Nat. Indem. Ins. Co.*, 319 F.3d 205, 218-19 (Cont'd)

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(5th Cir. 2003); *City of Hialeah, Fla. v. Rojas*, 311 F.3d 1096, 1100-01 (11th Cir. 2002); *Monahan v. City of Wilmington*, 49 Fed. Appx. 383, 384, 2002 WL 31341336, at *1 (3rd Cir. 2002); *Heimmermann v. First Union Mortg. Corp.*, 305 F.3d 1257, 1259 (11th Cir. 2002); *Casas v. American Airlines, Inc.*, 304 F.3d 517, 520 (5th Cir. 2002); *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 150 (3d Cir. 2002); *Coleman v. General Motors Accept. Corp.*, 296 F.3d 443, 446 (6th Cir. 2002); *Franze v. Equitable Assurance*, 296 F.3d 1250, 1251 (11th Cir. 2002); *McKowan Lowe & Co., Ltd. v. Jasmine, Ltd.*, 295 F.3d 380, 382 (3d Cir. 2002); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-16 (7th Cir. 2002); *Glover v. Standard Fed. Bank*, 283 F.3d 953, 959 (8th Cir. 2002); *West v. Prudential Secs., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002); *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 318 (5th Cir. 2002); *Smith v. Texaco, Inc.*, 281 F.3d 477, 479 (5th Cir. 2002); *Cason v. Nissan Motor Accept. Corp.*, 28 Fed. Appx. 392, 393, 2002 WL 22351, at *1 (6th Cir. Jan. 7, 2002) (appeal granted, then vacated on unrelated grounds); *Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 1345 (11th Cir. 2001); *In re Visa Check/ MasterMoney Antitrust Litig.*, 280 F.3d 124, 132 (2d Cir. 2001); *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 183 (3d Cir. 2001); *Isaacs v. Sprint Corp.*, 261 F.3d 679, 681 (7th Cir. 2001); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001); *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 478 (5th Cir. 2001); *Smilow v. S.W. Bell Mob. Sys., Inc.*, No. 01-8001, slip op. at 1-2 (1st Cir. July 12, 2001), *cited in Smilow*, 323 F.3d at 36; *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 141 (4th Cir. 2001); *Zinser v. Accufix Res. Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir.), *amended by* 273 F.3d 1266 (9th Cir. 2001); *Culpepper v. Irwin Mortg. Corp.*, 253 F.3d 1324, 1326 (11th Cir.), *reh'g denied*, 273 F.3d 1118 (11th Cir. 2001), *cert. denied*, 534 U.S. 1118 (2002); *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1236 n.7 (9th Cir. 2001); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001); *Murray v. Auslander*, 244 F.3d 807, 810 (11th Cir. 2001); *Kirkland v. Midland Mortg. Co.*, 243 F.3d 1277, 1279 (11th Cir. 2001); *In re LifeUSA Holding, Inc.*, 242 F.3d 136, 142 (3d Cir. 2001);

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This draconian impact should come as no surprise. With the exception of the "manifest error" prong, the D.C. Circuit standard was drawn from *In re Sumitomo Copper Litig.*, 262 F.3d 134, 140 (2d Cir. 2001), which did not mince words as to its intent to shut the door on Rule 23(f) appeals: "We anticipate, therefore, that the[se] standards of Rule 23(f) will rarely be met."

That was never the intent of the authors of Rule 23(f).[7] Throughout the Advisory Committee's lengthy consideration of this provision, the authors repeatedly described its fundamental importance given the fact that class certification

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Turner v. Beneficial Corp., 242 F.3d 1023, 1024 (11th Cir.) (en banc) (referencing panel's grant of 23(f) petition), *cert. denied*, 534 U.S. 820 (2001); *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 293 (5th Cir. 2001); *Patterson v. Mobil Oil Corp.*, 241 F.3d 417, 418 (5th Cir. 2001); *Smith v. Univ. of Wash. Law School*, 233 F.3d 1188, 1192 (9th Cir. 2000); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 973 (5th Cir. 2000); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1271 (11th Cir. 2000); *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1231 (11th Cir. 2000); *Pickett v. Iowa Beef Proc'rs*, 209 F.3d 1276, 1279 (11th Cir. 2000); *Waste Mgmt. Hldgs., Inc. v. Mowbray*, 208 F.3d 288, 295 (1st Cir. 2000); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 897 (7th Cir. 1999); *West Pub. Co. v. Carter*, No. 98-90015-D, 1999 WL 996377, at *1 (11th Cir. June 30, 1999); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 837 (7th Cir. 1999).

7. Indeed, in a subsequent opinion, the Second Circuit allowed interlocutory appeal under Rule 23(f) to address "a legal question about which there is a compelling need for immediate resolution" without requiring petitioner to demonstrate that that issue was likely to evade end-of-the-case review. *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 132 n.3 (2d Cir. 2001). Thus, the Second Circuit standard may in fact be significantly more liberal than the D.C. Circuit standard.

is often a case-defining or deciding event. *See, e.g.*, Civil Rules Advisory Comm., Minutes, April 28-29, 1994, 1994 WL 809916, at *10 (J.C.U.S. 1994) (comments of Herbert M. Wachtell, Esq., observing that provision for interlocutory appeal "is a desirable supplement to interlocutory appeal by certification of the district court and permission of the appellate court" because "[t]he decision on class certification is, at times, effectively the final decision in the action. Denial leaves the representatives unable to litigate the claim, while grant forces the defendant to settle").[8]

Indeed, the Advisory Committee defeated efforts to limit the breadth of the Rule. In response to public comment and testimony, the Committee removed statements in its Note that would have advised courts that the Rule was not intended to have broad effect: "Passages predicting that permission to appeal would be granted with restraint, and that the

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8. *Accord*, Civil Rules Advisory Comm., Minutes, Feb. 16-17, 1995, 1995 WL 870909, at *9 (J.C.U.S. 1995) ("Many participants believed that the opportunity for appeal, controlled in the discretion of the court of appeals, is highly desirable. The decision on class certification can have overwhelming importance. A defendant may feel forced to settle by certification, while a plaintiff may feel forced to abandon the claim by denial of certification."); *id.* at *17 (comments by Henry Thumann, Esq., describing 23(f) as a cure to "the *in terrorem* effect of an improvidently certified class"); *id.*, Minutes, Nov. 9-10, 1995, 1995 WL 870908, at *5 ("the draft is intended to make appeals more readily available" and "the major impetus for appeal will come in cases presenting unsettled issues of law"); *id.*, Minutes, May 1-2, 1997, 1997 WL 1056241, at *6 ("Appellate courts have strained to take a more active role in class-action law in recent years, with good results. Affording a more regular means of involvement, increasing the opportunities for appellate review, may do much to simplify current law and make practice more nearly uniform.").

proposed change is modest, were removed." Civil Rules Advisory Comm., Minutes, May 1-2, 1997, 1997 WL 1056241, at *7 (J.C.U.S. 1997). The final version of the Note thus charges that appeals presenting significant legal issues should be heard: "Permission is most likely to be granted when the certification decision turns on a novel or unsettled issue of law, ***or*** when, as a practical matter, the decision of certification is likely dispositive of the litigation." Fed. R. Civ. P. 23(f) Advisory Committee Note (emphasis added).

The D.C. Circuit rule cannot be reconciled with these principles. Even if the drafters intended courts of appeal to have broad, unfettered discretion akin to this Court's discretion to grant or deny writs of certiorari, *see id.*, they did not intend for those courts to use that discretion to limit review to the rarest of cases.

By contrast, standards adopted by the Third and Seventh Circuit comport with the drafters' intent, as they explicitly allow interlocutory appeals raising significant issues without requiring defendant prove that the issues are likely to evade end-of-the-case review. *See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001) (allowing Rule 23(f) review if the district court made "an erroneous ruling" or if the ruling would "facilitat[e] development of the law on class certification"); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) (granting interlocutory appeal because (a) the size of the proposed class put inordinate settlement pressure on the defendant, (b) the district court's decision was problematic, and (c) the 23(f) petition raised "important legal issues" that "have evaded attention by appellate courts"); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834-35 (7th Cir. 1999) (permitting appeal where (a) denial of class certification

effectively ends the case; (b) grant of class certification raises stakes of litigation and places inexorable pressure on defendant to settle; and (c) appeal would clarify fundamental issue of law).[9]

Not only is there an irreconcilable conflict between the D.C. Circuit and the Third and Seventh Circuits, but there also is a conflict between the D.C. Circuit and the Eleventh and Fourth Circuits. Those circuits utilize a flexible "sliding scale" test that permits review of important unsettled legal issues without requiring proof that the issues will evade end-of-the-case review. *See Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1271-77 (11th Cir. 2000) and *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 142-46 (4th Cir. 2001).[10]

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9. The First Circuit has praised the Seventh Circuit's *Blair* opinion as "cogently reasoned" and agreed that it "captures the essential principles on which Rule 23(f) rests." *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000). Nevertheless, to avoid a flood of interlocutory appeals and ensure that Rule 23(f) remains "the exception, not the rule," *id.*, *Mowbray* amended *Blair*'s third factor (fundamental issues of law) to emphasize that the issue must be "likely to escape effective review." *Id.* at 294. Thus, the First Circuit has adopted a highly restrictive standard closer to that of the D.C. Circuit, even though it professes affinity with the Seventh Circuit.

10. In *Prado-Steiman*, the Eleventh Circuit identified the following factors: (1) whether the district court's order is likely dispositive of the litigation by creating a "death knell" for either plaintiff or defendant; (2) whether petitioner has shown a substantial weakness in the class certification decision, such that the decision likely constitutes an abuse of discretion; (3) whether the appeal will permit resolution of an unsettled legal issue that is important to the particular litigation as well as important in itself; (4) the nature and

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Unlike the D.C. Circuit, the Third and Seventh Circuits recognize that Rule 23(f) review is important because class actions usually settle and, as a result, key district court decisions have "not been subject to appellate consideration." *Szabo*, 249 F.3d at 676. Thus, those courts focus on whether an appeal presents significant legal issues, whereas the D.C. Circuit considers whether end-of-the-case review is likely. Not surprisingly, the Third, Seventh, and Eleventh Circuits have employed Rule 23(f) to address significant class certification issues.

B. Sodexho's Petition Satisfied The Third, Fourth, Seventh, And Eleventh Circuits' Standards For Rule 23(f) Review.

The *Newton*, *Szabo*, and *Blair* factors fit this case like Cinderella's glass slipper. There is little question that, under the Third or Seventh Circuit standards or the broad balancing test used in the Eleventh and Fourth Circuits, Rule 23(f) review would have been granted in this case.

The massive size of the certified class and plaintiffs' claims alone would justify 23(f) review in the Seventh and

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status of the litigation before the district court; and (5) the likelihood that future events may make immediate appellate review more or less appropriate. Since *Prado-Steiman*, the Eleventh Circuit has granted Rule 23(f) petitions eight times (eleven times overall) and denied appeal once. The Sixth Circuit also employs a balancing test but does not mandate specific factors. *See In re Delta Air Lines*, 310 F.3d 953, 959 (6th Cir. 2002) (denying review under balancing test that expressly "eschew[s] any hard-and-fast" bright-line rule and instead holds that "any pertinent factor may be weighed in the exercise of th[e court's] discretion" to allow or reject Rule 23(f) petitions).

Third Circuits. *See Isaacs v. Sprint Corp.*, 261 F.3d 679, 681 (7th Cir. 2001) ("all [circuits] agree that a compelling case for the exercise of our new discretion is one in which the grant of class status places undue pressure on the defendant to settle regardless of the actual merit of the suit"). As the Seventh Circuit stated in *Szabo*, a certification order that "turns a "$ 200,000 dispute (the amount Szabo claims as damages) into a $ 200 million dispute. . . . puts a bet-your-company decision to [defendant]" that may "induce a settlement even if the [plaintiffs'] position is weak." *Szabo*, 249 F.3d at 675. Indeed, the historical record shows just that. Since Title VII was amended over a decade ago to include compensatory and punitive damages, ***no*** private sector employment discrimination class action to Sodexho's knowledge has proceeded through a full trial of liability and damages. Interlocutory review under Rule 23(f) is the only meaningful recourse for most defendants in Sodexho's situation.

Sodexho's petition also raised fundamental, unsettled issues of class action law that readily satisfied the Third and Seventh Circuit's tests.

First, Sodexho raised an open question in the D.C. Circuit (and a direct conflict among other circuits) as to whether a district court's class certification analysis is limited to consideration of the plaintiffs' evidence or whether the court may consider rebuttal evidence offered by the defendant. Applying Second Circuit precedent, the district court held that it could not consider defendant's statistical evidence demonstrating the absence of class-wide discrimination, even where that evidence was interstitial in nature and not simply reflecting a disagreement of experts. The only material question was whether plaintiffs' statistical

evidence was sufficiently relevant to the claims to be admissible (*i.e.*, a minimal *Daubert* question). Under this standard, little more than a deferential Fed. R. Civ. P. 12(b)(6) analysis is needed for certification, and any artfully framed complaint supported by a colorable expert opinion will satisfy Fed. R. Civ. P. 23.

This issue clearly constituted an unsettled, fundamental issue of law regarding class certification. While a sharply divided (2-1) Second Circuit panel opinion in *Caridad v. Metro-North Commuter R.R. Co.*, 191 F.3d 283, 292 (2d Cir. 1999) supported the district court's opinion, both the Third and Seventh Circuits reject that approach. *See Newton*, 259 F.3d at 167 (concluding that court may make a preliminary inquiry into the merits and should decide certification "'only after consideration of all relevant evidence and arguments'"); *Szabo*, 249 F.3d at 675 (reversing district court decision that had "certified the class without resolving factual and legal disputes that strongly influence the wisdom of class treatment"). Indeed, in *Szabo*, the Seventh Circuit expressly stated that the "proposition that a district court must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it[,]" 249 F.3d at 675, a position diametrically contrary to that of the district court and *Caridad*.[11]

11. Earlier decisions in at least two other circuits agree with the Third and Seventh Circuits. *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996) (holding that *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) does not bar inquiry beyond sufficiency of plaintiffs' allegations); *Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 273-74 (4th Cir. 1980) (district court must delve into the circumstances of the case because at this stage "the class action and merit inquiries essentially coincide"). Some district courts

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Commentators have underscored the profound significance of this conflict among the circuits, especially for employment discrimination cases, and called for clarification. *See* Robert G. Bone and David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1270 (2002) (describing "a rather muddled body of case law" in which the "[c]ourts disagree about how closely they can examine evidence and scrutinize the factual merits at the certification stage"). As Bone and Evans explain, the practical impact of a holding that district courts lack authority to engage in a critical analysis of plaintiffs' expert opinion, notwithstanding *Falcon*'s admonition that courts must "rigorously" assess class claims, is to ensure certification. *Id.* at 1325-26 (effect "is to insulate almost any expert's statistical evidence from challenge at this certification stage and ***virtually guarantee plaintiffs' success*** in establishing certification requirements. . . . even when the evidence for company-wide discrimination is seriously flawed") (emphasis added). This case, where the district court essentially started and stopped with plaintiffs' allegations and adopted their tepid statistical analysis wholesale,[12] presents a paradigm vehicle to address this fundamental issue of law.

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have therefore freely considered defendants' statistical evidence and expert reports. *See, e.g., Rhodes v. Cracker Barrel Old Country Store, Inc.*, 213 F.R.D. 619, __, 2003 WL 933152, at *52 (N.D. Ga. Mar. 7, 2003) (observing that where "statistical evidence established Rule 23 commonality and typicality elements[,]" the court "was obligated to conduct a careful review of the statistical evidence presented"); *Serafty v. Inter. Automated Sys., Inc.*, 180 F.R.D. 418, 421-22 (D. Utah 1998) (crediting defendant's expert statistical analysis as basis for rejecting certification).

12. As previously stated, Dr. Siskin's methodology was seriously flawed: (1) it did not account for important variables such

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Second, Sodexho challenged the district court's ruling that the existence of a decentralized and allegedly subjective system for managerial and executive level promotions may constitute a sufficient "policy" with discriminatory impact across the entire class. Here, too, the circuits are in conflict, and no clear D.C. Circuit precedent exists. Indeed, the district court itself recognized the lack of controlling precedent, *see* App. 35a, 208 F.R.D. at 442 ("there is really no case on point"), but it again essentially sided with *Caridad*, concluding that Dr. Siskin's finding of a shortfall in promotions for African Americans meant that Sodexho's subjective and decentralized process reflected a discriminatory policy.

As the district court recognized, the issue needs appellate scrutiny. A flurry of recent district court opinions have refused to certify classes in employment discrimination cases involving highly decentralized, geographically sprawling companies on commonality, typicality, or Rule 23(b)(3)

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as prior job experience or education, (2) it did not distinguish between seniority earned in managerial positions and non-managerial positions or in full-time and part-time positions, and (3) it did not analyze the results by division and region to determine whether a pattern of adverse treatment actually exists across Sodexho nationally. Just as troubling, the district court failed to analyze meaningfully Sodexho's evidence of a clear and fatal conflict of interest among class representatives and members, which, under D.C. Circuit precedent, *Wagner v. Taylor*, 836 F.2d 578, 595 (D.C. Cir. 1987), should have precluded certification. Those intra-class conflicts, a predictable consequence of certifying a class that includes all levels of management – from entry-level to division president – were not speculative and instead were well-documented by detailed testimony. The district court, however, sidestepped this defect by summarily dismissing that testimony as "confusing."

grounds.[13] By contrast, over a vigorous dissent, the divided

13. The district court elected not to follow numerous recent precedents to the contrary. *See, e.g., Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 670 (N.D. Ga. 2001) (use of decentralized, subjective hiring criteria for "broad, multi-facility class" defeats certification); *Cooper v. Southern Co.*, 205 F.R.D. 596, 626-27 (N.D. Ga. 2001) (in large, geographically sprawling company, individual managers' discretion did not constitute a "policy" of discrimination); *Donaldson v. Microsoft Corp.*, 205 F.R.D. 558, 567 (W.D. Wa. 2001) ("[c]ourts have recognized that it is not possible to make a finding of commonality where the putative class involves extensive diversity in terms of geography, job requirements, and/or managerial responsibilities"); *Beck v. Boeing Co.*, 203 F.R.D. 459, 463-64 (W.D. Wa. 2001) ("if these statistics do not apply at each and every location covered by the putative class, commonality has not been established", *aff'd in part, rev'd in part on other grds.*, 60 Fed. Appx. 38, 2003 WL 683797 (9th Cir. Feb. 25, 2003); *Wright v. Circuit City Stores, Inc.*, 201 F.R.D. 526, 542 (N.D. Ala. 2001) (claims of individuals "who worked in a 542 multi-state geographical area, in different organizational divisions . . . , in separate facilities, at different times, reporting directly to and under the direct supervision of numerous autonomous decision-makers. . . . do not lend themselves to class treatment"); *Abram v. United Parcel Serv. of Am., Inc.*, 200 F.R.D. 424, 432 (E.D. Wis. 2001) ("[h]ere, by contrast, the decisions of apparently hundreds of center managers are implicated, requiring many individualized inquiries that not only undermine 'commonality' but also have the potential to render class treatment unworkable"); *Reap v. Cont'l Cas. Co.*, 199 F.R.D. 536, 544-45 (D.N.J. 2001) ("policy of delegating discretionary employment decisions to local supervisors" is not ordinarily a basis for class certification "absent an allegation that the company intended to use this policy to discriminate"); *Miller v. Hygrade Food Prods. Corp.*, 198 F.R.D. 638, 642-44 (E.D. Pa. 2001) (individualized inquiries predominate where subjective standards were applied to "individuals employed in different divisions, under different supervisors, for varying durations of time"); *Lott v. Westinghouse Savannah Co. River*

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panel in *Caridad* reversed a district court decision that had reached a similar outcome. *See* 191 F.3d at 292; *compare with* 191 F.3d at 296 (Walker, J., dissenting) ("As a matter of law, I cannot agree . . . that [defendant's] practice of delegating personnel decisions – plaintiffs prefer to call it 'overdelegation' – constitutes a policy or practice sufficient to satisfy the commonality requirement").

The significance of this issue is compounded exponentially by the transparent flaws in plaintiffs' expert evidence. Many large corporations are vulnerable to

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Corp., 200 F.R.D. 539, 556 (D.S.C. 2000) ("[t]he diversity of employment conditions, coupled with the sheer absence of evidence proving [that] centralized decisionmaking for the types of decisions challenged in this suit compels the court to find a lack of commonality"); *Zachery v. Texaco Explor. & Prod., Inc.*, 185 F.R.D. 230, 239-40 (W.D. Tex. 1999) (refusing to certify multi-facility class working in 17 business units spread across 15 states, each with varying amounts of local autonomy over employment decisions); *Betts v. Sunstrand Corp.*, No. 97 C 50188, 1999 WL 436579, at *7 (N.D. Ill. 1999) ("[t]he lack of a centralized hiring decisionmaker, the sheer number of managers who hire applicants, and the wide range of jobs included in the prospective class, indicate the lack of a common nucleus of operative fact between class members"); *Abrams v. Kelsey-Seybold Med. Group, Inc.*, 178 F.R.D. 116, 130 (S.D. Tex. 1997) (commonality and typicality lacking because "the members of the purported class were not subjected to the same decision making authority"); *Zapata v. IBP, Inc.*, 167 F.R.D. 147, 159 (D. Kan. 1996) (absence of centralized employment decisionmaking or a showing of decentralization by the defendant may result in denial of class certification). *See also Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 278 (4th Cir. 1980) (reversing certification of statewide class where district court had failed "to appreciate the significance of the dispersion of . . . class members throughout a great number of geographically separated facilities").

a potentially devastating class action if subjective, decentralized decision-making for management level positions may be deemed a discriminatory "pattern or practice" merely because of a shortfall in promotions for African American managers to upper level managerial positions when measured by the date of their hire but not measured by potential differences in region, job status, education, prior experience, part-time experience or other obvious candidates that could account for the disparity. At least in *Caridad*, the plaintiffs' expert "controlled for various factors that one would expect to be relevant to the likelihood of disciplinary action and promotion." 191 F.3d at 293.

Finally, Sodexho petitioned the D.C. Circuit to consider another important, fundamental issue of law: whether the district court properly certified a class only for liability purposes without determining that the remedies sought by the class satisfy Rule 23(b). The district court acknowledged that at least one of plaintiffs' claims (a continuing violation theory) might preclude certification under Rule 23(b) for a remedy, *see* App. 40a n.27, 208 F.R.D. at 444 n.27, thus raising a clear possibility that plaintiffs' claims ultimately might not satisfy Rule 23(b). Again, the circuits have split on whether a district court may use a partial certification mechanism to avoid Rule 23(b). *Compare Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) ("The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial.") *with Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 167-69 (2d Cir. 2001) (allowing district court's partial certification).

Each of these issues warranted appellate review in its own right. Collectively, they presented a compelling set of important issues lying at the intersection of Rule 23 and massive employment discrimination actions. They easily parallel the issues raised in the numerous appeals that other circuits have allowed under Rule 23(f).

The unfairness of de minimis review under Rule 23(f) has not escaped Congressional attention. *See* Civil Rules Advisory Comm., Minutes, May 1-2, 1997, 1997 WL 1056241, at *6. Last year, the House of Representatives passed a bill, H.R. 2341, mandating an automatic right to interlocutory appeal of all certification decisions under Rule 23, and a similar bill has been introduced this year. Unfortunately for Sodexho and the many others in its predicament, even if it were to become law as currently drafted, the bill might not apply to currently pending cases. Nevertheless, the fact that the House would be so struck by the unfairness of the lack of an opportunity for interlocutory appeal that it would take steps to supersede Rule 23(f) speaks volumes to the degree to which the D.C. Circuit has strayed from the original intent of the Rule.

The interlocutory nature of Rule 23(f) makes certiorari imperative. By definition, if the conflict among the circuits regarding Rule 23(f) is ever to be reviewed by this Court, it must be done following the denial of leave to pursue an interlocutory appeal, as here. Given the magnitude of the class certified by the district court, the existence of numerous unsettled and important issues of law, and the overwhelming impact of the certification decision on the course of the case, the issue presented herein is uniquely situated for review by this Court.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE W. JOHNSTON
TODD J. HORN*
MITCHELL Y. MIRVISS
VENABLE, BAETJER AND HOWARD, LLP
1800 Mercantile Bank & Trust Bldg.
Two Hopkins Plaza
Baltimore, Maryland 21201
(410) 244-7400

Attorneys for Petitioner

* *Counsel of Record*

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR LEAVE TO APPEAL DATED AND FILED FEBRUARY 25, 2003

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-8008

September Term, 2002
01cv00510

In Re: Sodexho Marriott Services, Inc.,
c/o Prentice Hall Corporation System,

Petitioner

Filed On: February 25, 2003 [734038]

BEFORE: Edwards, Randolph and Tatel, Circuit Judges

ORDER

Upon consideration of the petition for leave to appeal pursuant to Fed. R. Civ. P. 23(f), the opposition thereto, and the reply, it is

ORDERED that the petition for leave to appeal be denied. Petitioner has not demonstrated that this case presents any "unsettled and fundamental issue[s] of law relating to class actions, important both to the specific litigation and

generally, that [are] likely to evade end-of-the-case review." *In re: Lorazepam & Clorazepate Antitrust Lit.*, 289 F.3d 98, 99-100 (D.C. Cir. 2002).

Because no appeal has been allowed, no mandate will issue. The Clerk is directed to transmit a certified copy of this order to the district court.

Per Curiam

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED AND FILED JUNE 25, 2002

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 01-510 (ESH)

CYNTHIA CARTER MCREYNOLDS, et al.,

Plaintiffs,

v.

SODEXHO MARRIOTT SERVICES, INC.,

Defendant.

ORDER

In *General Telephone Co. v. Falcon*,[1] the Supreme Court ruled that "a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23[] have been satisfied." *Id.* at 161. In accordance with that admonition, the parties in this case, a proposed class action brought under Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e, *et seq.*, have submitted nearly 150 pages of pleadings and nine volumes of exhibits. Upon consideration of this comprehensive record, the Court

1. 457 U.S. 147 (1983).

concludes that plaintiffs have fulfilled the requirements of Fed. R. Civ. P. 23(b)(2) with respect to the liability phase of the case, and their motion for class certification will therefore be granted to that extent.

BACKGROUND

I. Sodexho's Organizational Structure

The ten named plaintiffs, who are also the proposed class representatives, are current and former employees of defendant Sodexho Marriott Services, Inc. ("Sodexho"). Sodexho is the largest food and facilities management corporation in North America, with approximately 110,000 employees at 5,000 different client worksites, and over $4.7 billion in revenue last year. Sodexho was formed on March 27, 1998, from the merger of Marriott Management Services ("MMS"), a division of Marriott International, Inc., and Sodexho U.S.A. ("SUSA"), a branch of the French corporation Sodexho Alliance, S.A.[2] At the time of the merger, MMS employed approximately three times as many people as SUSA. (Def. Ex. 2, Declaration of Diana Newmier ("Newmier Decl.") ¶¶ 4-5.)

The parties dispute the nature of Sodexho's organizational structure. However, because the allegations in the complaint are presumed true for purposes of a motion for class certification, *In re Lorazepam & Clorazepate Antitrust Litigation*, 202 F.R.D. 12, 14 (D.D.C. 2001), *appeal denied*,

2. In June 2001, Sodexho Alliance, S.A. purchased the remaining shares of Sodexho Marriott and changed the name of the company to "Sodexho, Inc."

298 F.3d 98 (D.C. Cir. 2002); *Stevelman v. Alias Research Inc.*, 2000 WL 888385, at *1 (D. Conn. June 22, 2000) (citing *Shelter Realty Corp. v. Allied Maintenance Corp.*, 574 F.2d 656, 661 n.15 (2d Cir. 1978)); *Johnson v. Aronson Furniture Co.*, 1998 WL 641342, at *2 (N.D. Ill. Sept. 11, 1998) (citing *Johns v. DeLeonardis*, 145 F.R.D. 480, 482 (N.D. Ill. 1992)), the Court will assume the facts as set forth by plaintiffs.

According to the complaint, Sodexho is separated into six divisions — Corporate Services, Health Care, Campus Services,[3] School Services, Canada, and Laundry — of which the first four are the largest. (Complaint ¶ 17; Pl. Mem. at 3.) The primary responsibility of most employees in the Corporate Services, Health Care, Campus Services, and School Services divisions is to provide food and facilities management services to their clients, and the names of these divisions reflect the nature of the clients' businesses rather than the services that Sodexho provides to them.[4] (Pl. Mem.

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3. This division is identified in the complaint as "Education." (Complaint ¶ 17.)

4. Sodexho contends that its "distinct divisions, and the services each provide, reflect real differences in management functions and competencies. For example, . . . managers in Health Care accounts often are required to have more sophisticated knowledge of dietary and nutritional planning than in other accounts [and], due to regulatory compliance issues, [are] intimately and actively involved in the administration of the client hospital. Corporate Services accounts, in contrast, have no correlative regulations . . . but tend to provide a lower volume, but higher quality, of food services to its clients." (Def. Opp. at 6 (internal citations omitted).) However, as discussed *infra* at note 23, whether these distinctions exist is of little relevance to the class certification motion.

at 3; Def. Opp. at 6.) Laundry Services cleans linens and uniforms for health care and lodging clients.[5] Most Sodexho employees work on the premises of their clients. These positions are known as "in-unit" or "operations" jobs. (Complaint ¶ 18.) The highest in-unit position is the Director or General Manager of a client facility. (*Id.*) The promotional pool for managerial positions is company-wide, and managers apply for and receive promotions across divisions. (Pl. Ex. 4, Deposition of Henry Watkis ("Watkis Dep.") at 67-68.) However, each division maintains its own human resources department, and most promotion decisions are made and reviewed entirely within each unit. (Def. Ex. 1, Declaration of Ollie Lawrence ("Lawrence Decl.") ¶¶ 21-23.)[6]

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5. No information has been provided to the Court about the nature of the "Canada" division. Defendant also characterizes Sodexho as having six divisions, but states that the sixth division is its corporate headquarters, rather than the Canada unit. (Def. Opp. at 6.)

6. Defendant does not dispute that vacancies are posted company-wide, but contends that in practice, promotions occur almost entirely within a division, noting that only four percent of employees move between divisions in any given period. (Def. Opp. at 17-18; Def. Ex. 10, Report of Joan Haworth ("Haworth Rep.") ¶ 68.) In light of plaintiffs' claim that 28 percent of all applicants for open positions come from outside the division in which the job is posted (Pl. Reply at 12-13; Pl. Ex. 50, Supplemental Report of Dr. Bernard Siskin ("Siskin Supp. Rep.") at 9 n.8), defendants' statistics about the lack of promotions among divisions may actually support plaintiffs' allegations of preselection for open positions. *See infra* pp. 6-8.

Appendix B

A smaller group of Sodexho employees works at its corporate offices and other locations as supervisors or in areas such as sales, human resources, or finance. Managers in these areas are said to work "above the unit," and "generally have greater authority and receive higher salary, benefits, and perquisites than General Managers." (Answer ¶ 19.) In fact, General Managers typically report directly to an above-the-unit manager known as a District Manager. (*Id.*)

Until late 1998, Sodexho organized its salaried positions by grades, which ranged from 40 to 64. Most in-unit managers occupied grades in the 40s, while General Managers held grades 51 to 53, and District Managers held grades 51 to 54. Most General Managers were grade 51, and most District Managers were grade 52 or 53. (Pl. Ex. 9, Expert Report of Bernard Siskin ("Siskin Rep.") at Tables 1-2.) In late 1998, Sodexho reclassified its salaried positions using a broader band system, and multiple grades under the former system were collapsed into a single band. That system is still in effect today. In-unit managers now occupy bands 75 to 77; lower out-of-unit employees hold bands 85 to 88; and above-the-unit positions are bands 89 to 95. (Siskin Rep. at 2.)

II. Sodexho's Promotion Policies and Practices

Sodexho is a corporate giant, and as a result, its personnel decisions are largely decentralized. As defendant notes, "each manager at Sodexho has discretion to decide what criteria to apply in making decisions involving promotions and other personnel actions." (Def. Opp. at 12-13; *see* Def. Ex. 28, Deposition of Cynthia Carter McReynolds ("McReynolds Dep.") at 46-54.)

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In 1994, in response to "a multi-million dollar discrimination suit," MMS implemented a formal system for salaried positions called the Marriott Career Management System ("MCMS"). (Pl. Ex. 13.) Under MCMS, employees in any division could apply for job vacancies throughout the country with the consent of their supervisor. This posting process applied company-wide, and employees could apply for jobs in other divisions.[7] (Pl. Ex. 12, Deposition of William Anstee ("Anstee Dep.") at 28, 133; Pl. Ex. 16, Deposition of George Koenig ("Koenig Dep.") at 90-91.) This system survived the 1998 merger, and in 2000, Sodexho modified its posting system using a web-based program so that employees could immediately apply for job vacancies without their supervisors' consent. (Pl. Ex. 19, Deposition of Dolores Coe ("Coe Dep.") at 201-02; Complaint ¶ 20.) This system is known as "Career Center" or "Talent Point." (*Id.*) In other material aspects, the promotion system has not changed since 1994.

However, MCMS's role in the promotion practices is somewhat unclear. A February 23, 1999 Sodexho internal memorandum summarized the problems with MCMS that existed at the time. In particular, the memo noted that the system was "[v]iewed as customer unfriendly, not time efficient to use," and that there was "[n]o adequate system for follow up to candidates who post." (Pl. Ex. 18, at 2.) The company's own statistics bear this out. In 1998, for

7. SUSA had a similar system in place before the merger. Job openings were posted through a central administration point, and individual managers wrote instructions describing how to apply for each position. SUSA's system did not have the "ability to track candidates." (*See* Pl. Ex. 18, AT 1.)

instance, 5,215 positions were posted on MCMS, but only 1,671 were filled, while 2,595 were closed or deleted. (*Id.* at 3.) Moreover, at the time of the 1999 memorandum, Sodexho was still trying to determine "[w]hat positions should be posted [and h]ow long [positions should] be posted for." (*Id.*)

Irrespective of how an employee applies for a promotion, defendant's promotion decision-making process is decentralized and allows unfettered managerial discretion. (Def. Opp. at 12.) According to William Anstee, Sodexho's witness on its promotion process, the hiring manager has complete discretion to decide whom to interview for each position. (Anstee Dep. at 81.) There are no company rules or guidelines regarding the promotion process, and there are no requirements to take any notes during the interview process, to rank applicants, or to explain the selection. (*Id.* at 90-92.) After a hiring manager makes his selection, he "would take that decision to whoever their boss was [and] say, hey, I've selected candidate A. . . . And then the district manager along with the human resource manager [puts] toget .er an offer if that, indeed, was what it was." (*Id.* at 92.) In short, Sodexho has "no company guidelines or fixed criteria or anything . . . to follow in making those decisions." (*Id.* at 182.)

III. Plaintiffs' Allegations of Discrimination

Plaintiffs challenge these promotion practices as they relate to high-level managerial positions at or above the level of an above-the-unit manager. (Complaint ¶ 22.) Specifically, they contend that the system for filling vacant managerial slots is characterized by three common elements: (1) positions

are filled without being posted at all; (2) when jobs are posted, favored employees are preselected for the positions; and (3) when "more than one person is actually considered for an opening, hiring managers have virtually total discretion in their promotion decisions because they are not given job-related or objective criteria and are not required to document the reasons for their decisions, making them unreviewable." (Pl. Mem. at 7.) Plaintiffs allege racial discrimination under both disparate treatment and disparate impact theories, and seek to certify a class

> of all African-Americans who are or were salaried employees of Sodexho [ ] at any time from March 9, 1998, to the present, and who have held or sought to obtain (1) an upper-level managerial, supervisory, or professional position (above-the-unit or comparable level of responsibility) or (2) a job that would lead to such a position, and who have been, continue to be, or may in the future be adversely impacted by Sodexho's racially discriminatory policies and practices affecting promotions or advancement.

(Pl. Mot. at 1.)

This system is discriminatory, according to plaintiffs, because high-level managers at Sodexho are predominantly white, and white employees are pre-selected for and promoted to managerial positions at the expense of more qualified African-American applicants, who receive no response to their job inquiries. To support this argument, plaintiffs offer both statistical and anecdotal evidence, including the

testimony of a senior-level white manager who charges that Sodexho has intentionally discriminated against African-American employees in its promotion practices.

Although the parties have extensively briefed the merits of plaintiffs' Title VII claims at this class certification stage, an abbreviated survey of the plaintiffs' evidence that is relevant to the instant motion is set forth below. As noted, this evidence is the traditional combination of "anecdotal evidence of discrimination in combination with statistical evidence of minority underrepresentation." *Allen v. Chicago Transit Authority*, 2000 WL 1207408, at *10 (N.D. Ill. 2000).

A. Anecdotal Evidence of Discrimination

Plaintiffs offer numerous anecdotes of discrimination from the testimony of high-level Sodexho officials. For example, they cite the testimony of Sodexho's top official for equal employment opportunity, who stated that the number of African-American promotions "indicated a problem" and "would be considered low" (Pl. Mem. at 15; Watkis Dep. at 202-03); the President of Sodexho's Health Care Division, who, in describing the lack of women among the 100 District Managers in that unit, noted, "Well, you think that's bad, I think Henry [Richardson] is the only black one we have" (Pl. Mem. at 16; Pl. Ex. 26, Deposition of Kelly Hymes ("Hymes Dep.") at 312-13); the deposition testimony of a named plaintiff, who recalled the statement of a Sodexho Human Resources Manager at a conference that there was no point in training other Human Resources Managers to recruit more African Americans, because "our district managers won't hire [black people]," a statement with which

others at the conference — including a Corporate Vice President — allegedly agreed (Pl. Mem. at 18-19; Pl. Ex. 28, Deposition of Tasha Hardy ("Hardy Dep.") at 163, 208-09); and the comment of Brenda Hendrickson, an African-American supervisor at the company, that it is "common practice at Sodexho for white managers to refer to African Americans as 'you people' or similar phrases."[8] (Pl. Mem. at 20; Pl. Ex. 7, Deposition of Brenda Hendrickson ("Hendrickson Dep.") at 113-14, 117-19.)

Plaintiffs also offer the testimony of Kelly Hymes, a white former District Manager, who testified to episodes of preselection of white managers by white decision-makers, the use of the posting process as a "formality," and the derogatory statements about African-Americans attributed to a white upper-level manager, who allegedly said that "African Americans were genetically inferior to whites, and genetically most of the criminals in the world were African Americans, and that they didn't deserve to have promotions." (Pl. Mem. at 19; Hymes Dep. at 95-101, 179, 184.)

In addition, plaintiffs contend that Sodexho has ignored warnings to remedy this discrimination, but instead, it has tried to cover it up. For example, plaintiffs allege that beginning in 1995, MMS executives were made aware of the lack of African-American above-the-unit managers by members of the company's diversity roundtable group, but

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8. Some of the anecdotal evidence of discrimination offered by plaintiffs predates the class period. Nonetheless, this testimony may still be relevant to a finding of liability and to injuries suffered during the class period if plaintiff shows an ongoing pattern of discrimination. *See infra* note 16.

did nothing to remedy the problem. (Pl. Ex. 8, Deposition of Chip Moss ("Moss Dep.") at 200-02.) They also cite the deposition testimony of Ellen Early, a putative class member, who stated that a white Sodexho executive refused to let her look at the company's workforce composition data during a Sodexho diversity meeting. "[T]he executive said to me that he could not fax the information to me. And when I stated why, he said, well, because the numbers really don't look very good. . . . He said, we're not — we're not letting any of this out. . . ." (Pl. Ex. 25, Deposition of Ellen Early ("Early Dep.") at 242-43.)

B. Statistical Evidence of Minority Under-representation

The parties devote much of their time to jousting over the merits of the analyses of their respective statistical experts. While this Circuit has not squarely addressed the standard for evaluating the parties' competing statistical evidence on a motion for class certification, it has recognized that a trial court should accept plaintiff's statistical evidence as true at this stage. *See, e.g., Wagner v. Taylor*, 836 F.2d 578, 594 (D.C. Cir. 1987) (accepting as true plaintiff's proferred statistics for purpose of motion for class certification, and holding that "[p]laintiffs seeking class certification are not required to prove the merits of their cases, but their presentations must be specific enough to allow the court to discern at least a rough outline of a class that properly can be certified"); *Gonzalez v. Brady*, 136 F.R.D. 329, 333 (D.D.C. 1991) (accepting plaintiffs' statistics as true for purposes of the Rule 23 inquiry). Moreover, the Second Circuit has considered this issue and held that, while "[a] district court must ensure that the basis of the expert

[statistical] opinion is not so flawed that it would be inadmissible as a matter of law, . . . [it] may not weigh conflicting expert evidence." *In re Visa Check/Mastermoney Antitrust Litigation*, 280 F.3d 124, 135 (2d Cir. 2001). In short, "this sort of statistical dueling is not relevant to the certification determination."[9] *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283, 292 (2d Cir. 1999) (internal quotation omitted). This doctrine has been adopted by other courts around the country. *See, e.g., DeLoach v. Philip Morris Cos.*, 2002 WL 559453, at *13 (M.D. N.C. Apr. 3, 2002); *Wilfong v. Rent-A-Center, Inc.*, 2001 WL 1728985 (S.D. Ill. Dec. 27, 2001). Nonethe-less, an examination of the statistics proferred by plaintiffs is pertinent to the question of class certification.[10] *Wagner*, 836 F.2d at 592-94.

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9. Defendant's argument that the Court should weigh the statistical analysis offered by the defendant against that of the plaintiffs at the class certification stage lacks support in the case law. Neither of the two cases that defendant relies on for this proposition addressed a motion for class certification; rather, both cases considered conflicting statistics on a dispositive motion. *See Coward v. ADT Sec. Sys., Inc.*, 140 F.3d 271 (D.C. Cir. 1998); *Koger v. Reno*, 98 F.3d 631 (D.C. Cir. 1996).

10. This Circuit has noted that "[w]hile statistics can generally be probative of the [questions presented under the Rule 23 analysis, it] would feel uncomfortable in resting on the trial statistics in the present record for a final determination of commonality." *Hartman v. Duffey*, 19 F.3d 1459, 1473 (D.C. Cir. 1994). In *Hartman*, however, the factual record contained a "paucity" of statistical evidence, and no real anecdotal evidence of discrimination. *Id.* at 1473-74. In contrast, the record before this Court is thorough and well-developed, making certification based on anecdotal and statistical evidence appropriate.

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Plaintiffs' statistical expert, Dr. Bernard Siskin, conducted two separate analyses of Sodexho's promotion system. In his first study, he analyzed promotions between grades and bands. Siskin noted that as of January 2001, only 10 of 306 District Managers (3.3 percent) were African-American, despite the fact that 13.3 percent of Unit and General Managers were black. (Siskin Rep. ¶ 3.) Moreover, only 18 out of 692 above-the-unit jobs, or 2.6 percent, were held by African Americans as of September 2000. (Pl. Ex. 43.) Examining Sodexho workforce composition data since 1995[11] and controlling for race and seniority, Siskin found that African Americans received 143 fewer promotions than they would have in a non-discriminatory system. (Siskin Rep. ¶ 7.) Siskin determined that the likelihood of this occurring without race being a factor was less than one in 82.7 billion. (*Id.* ¶ 33.) He also concluded that African-American employees were stuck at the lowest levels of management for their seniority. "If African American and white management employees who were similarly situated with respect to seniority had been equally likely in the year 2001 to be at a given band, there would be 174 more African Americans at bands 76 and 77, 27 more African Americans at bands 88 and 89, and 42 more African Americans at bands 90 and above." (*Id.* ¶ 24.) Siskin found the standard deviations for these disparities to be 8.58, 4.42, and 5.40,

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11. Although the class period extends back only to 1998, Siskin's analysis on the effects of the promotion process begins in 1995, which is the beginning of "the period for which [he had] data to identify promotions." (Siskin Rep. ¶ 7; *see* Pl. Mem. at 26 n.26)

respectively.[12] (*Id.*) Next, Siskin examined the effect of these disparities on salaries, and determined that the typical African-American Sodexho employee received $4,934 per year less than his white counterpart, at a standard deviation of 6.16. (*Id.* ¶ 40.)

Finally, Siskin found that Sodexho segregates its employees by race. Plaintiffs' statistics indicate that 596 of Sodexho's 878 units have no black managers, and that nearly two-thirds of all African-American managers in the remaining 282 units are concentrated in fewer than ten percent of those accounts. (Watkis Dep. at Exs. 34, 37.) Siskin determined that black managers are two-to-three times as likely as white managers to report to an African-American District Manager (Siskin Rep. ¶ 39), and that the statistical evidence supports testimony that African-American managers are disproportionately assigned to "black accounts."[13] (*Id.* ¶ 4; Hymes Dep. at 389-90.)

In his second study, Siskin also examined within-band promotions. With the addition of this new data, Siskin found

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12. Standard deviations above 1.96 units have been found sufficient to establish prima facie cases of both disparate treatment and disparate impact. *See Anderson v. Zubieta*, 180 F.3d 329, 339-40 (D.C. Cir. 1999).

13. For example, 29 of Sodexho's 33 managers at Tuskegee University, Florida A & M, Howard University, Prairie View A & M, and North Carolina A & T—all of which are historically black colleges—are African-American, whereas only 4 of its 72 managers at American University, Marquette University, Wellesley College, Providence College, and Harvard Law School are black. (*Id.* ¶ 4.)

that the shortfall in promotions for African Americans nearly doubled, rising from 143 to 265.[14] (Siskin Supp. Rep. ¶ 6.) Siskin also analyzed the study of plaintiff's statistical expert, Dr. Joan Haworth, who had examined Sodexho's promotion of African-American employees by division. Siskin found that there was a shortfall in each division, and that even though these shortfalls varied from division to division, the disparity was statistically insignificant. Siskin therefore concluded that the discrimination was company-wide, and that the level of bias did not statistically vary by division. (*Id.* ¶¶ 22-23.) "In sum," Siskin wrote, "the pattern of shortfalls in each division is consistent with a common promotion process, and hence supports the argument that there is a common discriminatory company-wide promotion process." (*Id.* ¶ 23.)

C. The Allegations of the Named Plaintiffs

In addition to their classwide allegations of discrimination, each of the ten named plaintiffs has set forth individual claims of racial discrimination in the complaint. Although concentrated primarily in the Health Care unit, the named plaintiffs also represent the Education, School Services, and Corporate Services divisions of Sodexho.[15] In addition, while most of the named plaintiffs worked for Sodexho in the District of Columbia, Virginia and Maryland, one was employed in California, and another is a resident of Georgia.

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14. In his earlier report, Siskin analyzed 5,226 promotions; in the supplemental study, he examined 10,002 promotions. (*Id.* ¶ 6.)

15. There are no named plaintiffs representing either the Laundry or Canada division. *See infra* note 30.

Appendix B

All of the named plaintiffs worked at MMS before it merged with SUSA, and all allege that they have been discriminated against because of their race in the course of applying for a promotion.

Cynthia McReynolds began working at MMS in 1984, and is currently employed in Sodexho's Health Care Division as the General Manager of Howard University Hospital in the District of Columbia. (Complaint ¶ 4.) In her 17 years of employment at Sodexho, McReynolds has posted for vacant positions — primarily those outside of her unit — between 50 and 75 times. Although she has been promoted within her unit, McReynolds has never received an out-of-unit promotion, and contends that she has repeatedly been passed over in favor of less qualified white applicants. (*Id.* ¶ 46a.) In 2000, for example, McReynolds posted for at least seven positions, but received no information regarding any of her applications. (*Id.* ¶ 46b.) She alleges that several years before, she was passed over for promotions to Senior Manager of Human Resources and Human Resources Recruiting Manager in favor of less qualified white applicants. (*Id.* ¶¶ 46c-e.)

Lisa Mitchell worked at MMS and Sodexho from 1988 to 1999, and was employed primarily in the Health Care Division. (*Id.* ¶ 5.) Just prior to leaving the company, she worked as General Manager of Suburban Hospital in Bethesda, Maryland, where she alleges that she was discriminated against in a variety of ways by her white supervisor. (*Id.* ¶¶ 45a-c.) Mitchell also claims that in 1994, she was passed over for a promotion in favor of a less-qualified white employee who not only was not one of the original applicants for the position, but in fact had been a

member of the panel that was interviewing candidates for the job. Mitchell complained about this conflict to the white Regional Vice President, who refused to change the selection decision.[16] (*Id.* ¶ 45d.)

Robert Morris began working at MMS in 1990, and is currently employed in Sodexho's Health Care Division as a General Manager at the Civista Medical Center in La Plata, Maryland. (*Id.* ¶ 6.) Morris contends that he has been passed over for promotions as a result of the preselection of white candidates, and specifically, that he was discriminated against when Sodexho hired a less qualified white candidate as Acting Director of Prince Georges Hospital, without even offering Morris the opportunity to interview for the acting or permanent position. (*Id.* ¶ 40.)

Chip Moss worked in the Health Care Division of MMS and Sodexho in Maryland and Virginia from 1993 to 2000. (*Id.* ¶¶ 7, 41.) In 1999, he applied for the position of District Manager in the Senior Services Division, which is part of the company's Health Care Division in Gaithersburg, Maryland. However, Moss was not offered the opportunity to interview for the position, which instead was filled by a white male. (*Id.* ¶ 41a.) A few months later, he attempted to apply to be the General Manager at Fairfax Hospital, although the job was not posted. Moss was rebuffed when the white District Manager failed to return his phone calls, and then

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16. Although plaintiffs do not seek damages for this and other incidents that occurred before March 1998, evidence of these events may be relevant to injuries suffered after that time if the injuries were caused by an ongoing pattern of discrimination. *See Bazemore v. Friday*, 478 U.S. 385, 396 (1986).

hired a white applicant for the position. Moss never received an explanation as to why he was not even interviewed for either of these vacancies. (*Id.* ¶¶ 41a-b.)

Marilyn McNish has been employed by MMS and Sodexho since 1991, and currently works in the Health Care Division as a Clinical Nutrition Manager at Prince Georges Hospital in Cheverly, Maryland. (*Id.* ¶ 8.) McNish alleges that it took her ten years and an EEOC complaint to be promoted to her current position, while similarly situated white employees were promoted in a fraction of that time. (*Id.* ¶ 42.)

Ezzie Henry worked primarily in the School Services Division of MMS and Sodexho from 1993 to 2000, and currently lives in Port Deposit, Maryland. (*Id.* ¶ 9.) In her six years as a Human Resources Specialist, Henry posted for managerial positions at least ten times, but received only one temporary promotion. (*Id.* ¶ 37a.) She alleges that she was discriminated against because of her race when she applied to become Senior Human Resources Manager for the Health Care Division (*Id.* ¶ 37b), and contends that during her tenure in Human Resources, she frequently saw hiring managers circumvent MCMS by requesting that the paperwork of newly hired employees be processed before the job announcements were even posted. (*Id.* ¶ 37c.)

Dwain Richardson began his employment at MMS and Sodexho in 1995, and is currently the General Manager at INOVA Fair Oaks Hospital in Fairfax, Virginia. (*Id.* ¶ 10.) Richardson alleges that he repeatedly posted for vacant positions but never heard anything about his applications.

(*Id.* ¶ 38a.) In December 1999, he posted for his current position, but was denied the promotion even though he was the only qualified applicant.[17] (*Id.* ¶ 38b.)

Tasha Hardy was employed from 1997 to 2000 by MMS and Sodexho, where she worked in the Corporate Services Division in California as a Human Resources Manager. (*Id.* ¶ 11.) Hardy alleges that she was denied the opportunity to seek a higher-level position in the Health Care Division because her white supervisor refused to allow her to apply for the promotion (*Id.* ¶ 39a), and is aware of only three African-American managers in the West Coast Corporate Services Division, out of at least 350 managers. (*Id.* ¶ 39c.) In 2000, Hardy attended the "Diversity Forum for Recruiters," a national conference for Sodexho Human Resource Managers, where she and other Human Resource Managers agreed that it would be impossible to convince Sodexho's District Managers, who are predominantly white, to promote more African Americans. (*Id.*)

Gail Darlington worked in the Health Care Division at MMS and Sodexho from 1988 to 1996. She returned to the company in 1999, and currently works in Georgia in the Corporate Services Division as an Information Systems Consultant. (*Id.* ¶ 12.) Darlington alleges, based on her experience, that "African-American managers in the Health Care Division work primarily at hospitals that serve mostly African-American populations and are staffed predominantly

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17. According to the Complaint, Richardson was promoted to this position six months later only after Sodexho's client intervened and insisted on the promotion. (*Id.* ¶ 38c.)

by African-American hourly employees." (*Id.* ¶ 43b.) She also contends that she has been passed over for promotions in favor of preselected white applicants, and offers evidence of discriminatory comments by white Sodexho employees. (*Id.* ¶¶ 43a, c.)

Samuel Cokes' employment with MMS dates back to 1975. Although he currently works in the Health Care Division at Howard University Hospital as a Production Manager, Cokes was previously employed for 15 years in the company's Education Division. (*Id.* ¶ 13.) Cokes has received only two promotions over his 26 years — from Unit Supervisor to Production Manager, and from Production Manager to Director of Food Services at Virginia Commonwealth University in Richmond. Cokes claims that he was subsequently removed from his position as Director of Food Services despite good performance, and was replaced by a white employee. He has not been promoted in the 12 years since, although he has continued to seek promotions. (*Id.* ¶ 44a.) Cokes also charges that he has been interested in several positions that had been filled before they were even posted, and has been prevented from advancing at Sodexho by the pervasive discrimination at the company. (*Id.* ¶¶ 44b-d.)

These ten named plaintiffs filed this action on March 12, 2001. The parties then conducted extensive discovery on the class certification issue before plaintiffs filed their Rule 23 motion. Following a discovery period of almost six months, the parties filed extensive briefs chronicling the facts as developed to date and analyzing the constantly expanding and complex body of law relating to Title VII class actions. The Court wishes to commend counsel for their comprehensive and helpful briefs.

Appendix B

LEGAL ANALYSIS

I. Standard of Review

The standards governing a motion for class certification in a Title VII action are of critical importance. Two cases that bind this Court — *Falcon* and *Wagner* — have discussed this issue in detail, and have provided an intricate blueprint for examining such a motion. The analysis begins with Rule 23(a) of the Federal Rules of Civil Procedure, which sets forth four prerequisites to a class action.

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). If these prerequisites are satisfied, a class action may be maintained if, *inter alia*,

> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

> (3) the court finds that questions of law or fact common to the members of the class predominate over any questions affecting individualized members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed. R. Civ. P. 23(b). Plaintiffs bear the burden of proof on each element of Rule 23. *McCarthy v. Kleindienst*, 741 F.2d 1406, 1414 n.9 (D.C. Cir. 1984). "A district court exercises broad discretion in deciding whether to permit a case to proceed as a class action." *Hartman*, 19 F.3d at 1471 (citing *Bermudez v. Dep't of Agriculture*, 490 F.2d 718, 725 (D.C. Cir. 1973)). However, "a decision on class certification cannot be made in a vacuum. While, of course, a court does not possess 'any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action,' . . . some inspection of the circumstances of the case is essential to determine whether the prerequisites of [] Rule 23 have been met." *Wagner*, 836 F.2d at 587 (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974)).

The level of inspection required in proposed Title VII class actions has been the subject of much debate, particularly with regard to the commonality and typicality prongs of Rule 23(a). As this Circuit noted,

> Rule 23 inquiries in the context of Title VII racial discrimination suits have presented courts with a peculiar set of problems. These stem from the fact, as stated by the Supreme Court, that "racial

> discrimination is by definition class discrimination." Recognition of this fact has left uncertain the degree of permissiveness tolerable in applying the requirements of Rule 23 in Title VII litigation, and has promoted a difference of opinion as to the proper standard for certifying Title VII classes.

Wagner, 836 F.2d at 588 (quoting *Falcon*, 457 U.S. at 157). Prior to *Falcon*, many courts had adopted an "across-the-board" approach to Title VII class certification, whereby "any case featuring a proposed class composed of all members of a minority group connected in some fashion with a particular employer is deemed to present common questions of law and fact, regardless of individual variations in terms of discriminatory practices suffered or injuries sustained, merely by virtue of an allegation that racial discrimination had occurred." *Wagner*, 836 F.2d at 588.

In *Falcon*, however, the Court rejected this approach as insufficient.

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims. For [plaintiff] to bridge that gap,

> he must prove much more than the validity of his own claim. Even though evidence that he was passed over for promotion when several less deserving whites were advanced may support the conclusion that [plaintiff] was denied the promotion because of his national origin, such evidence would not necessarily justify the additional inferences (1) that this discriminatory treatment is typical of [defendant's] promotion practices, (2) that [defendant's] promotion practices are motivated by a policy of ethnic discrimination that pervades [it], or (3) that this policy of ethnic discrimination is reflected in [defendant's] other employment practices, such as hiring, in the same way it is manifested in the promotion practices.

Falcon, 457 U.S. at 157-58. Nonetheless, the *Falcon* Court did identify in a footnote two possible types of across-the-board class actions that could satisfy the requirements of Rule 23.

> If [defendant] used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a). Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested

> itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes. In this regard, it is noteworthy that Title VII prohibits discriminatory employment *practices*, not an abstract policy of discrimination. The mere fact that an aggrieved plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer.

Id. at 159 n.15 (emphasis in original).

In *Wagner*, this Circuit interpreted the Court's decision in *Falcon*.

> What the Court demands from those seeking certification of a class cutting across employment status or job categories is a 'specific presentation' identifying the questions of law or fact common to the class representative and the members of the class proposed. The Court has identified two qualifying presentations, the first involving an employer who used a biased testing procedure to evaluate both applicants for employment and incumbent employees seeking promotions, and the second attacking an employer whose general policy of discrimination manifested itself in hiring and promotion in the same general manner, such as through entirely subjective decisionmaking

> processes. Significant proof of either practice, then, should assure certification of a class containing both actual and potential employees.

Wagner, 836 F.2d at 589 (quoting *Falcon*, 457 U.S. at 158). The requisite showing to qualify as "significant proof" was refined by this Circuit in *Hartman*, when it noted that "the plaintiff bears the 'obligation to show, in at least a preliminary fashion, the required commonality between her claims and those of the putative class.'" *Hartman*, 19 F.3d at 1472 (quoting *Nelson v. United States Steel Corp.*, 709 F.2d 675, 680 (11th Cir. 1983)). "Nevertheless, a motion for class certification is not an occasion for examination of the merits of the case." *Caridad*, 191 F.3d at 291.

Plaintiffs have brought claims for both disparate treatment and disparate impact. In *Palmer v. Schultz*, 815 F.2d 84 (D.C. Cir. 1987), this Circuit explained the difference between the two types of claims.

> Under Title VII a plaintiff can rely on either of two different theories to support a claim of unlawful sex discrimination. A "disparate treatment" claim alleges that the defendant intentionally based an employment decision on the sex of the plaintiffs. Disparate treatment claims can involve an isolated incident of discrimination against a single individual, or, as in this case, allegations of a "pattern or practice" of discrimination affecting an entire class of individuals. *Id.* A "disparate impact" claim alleges that the defendant based an employment decision

> on a criterion that although "facially neutral" nevertheless impermissibly disadvantaged individuals of one sex more than the other.

Palmer, 815 F.2d at 90 (citing *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-36 (1977)). However, "'an important point of convergence' between disparate treatment and disparate impact claims exists in class actions such as this one. Because both . . . claims 'are attacks on the systemic results of employment practices . . . proof of each claim will involve a showing of disparity between the minority and majority groups in an employer's workforce.'" *Moore v. Summers*, 113 F. Supp. 2d 5, 19 (D.D.C. 2000) (quoting *Segar v. Smith*, 738 F.2d 1249, 1267 (D.C. Cir. 1984)). The Court will proceed with its Rule 23 analysis with regard to both types of claims.

II. Rule 23(a) Analysis

As noted, plaintiffs seek to certify a class consisting of all current and former African-American Sodexho employees from March 9, 1998 to the present who held or sought to obtain (1) a position at or comparable to the level of above-the-unit, or (2) a job that would lead to such a position, and who have been, are, or may be "adversely impacted by Sodexho's racially discriminatory policies and practices affecting promotions or advancement." (Pl. Mot. at 1.) With an estimated 2,000 or more members in the proposed class (Complaint ¶ 59), defendant does not contest the numerosity requirement of Rule 23(a)(1), and the putative class clearly satisfies that standard. *See Stewart v. Rubin*, 948 F. Supp. 1077, 1088 (D.D.C. 1996), *aff'd*, 124 F.3d 1309

(D.C. Cir. 1997) (245-member class spread throughout the country satisfies numerosity requirement). The commonality, typicality, and adequacy prongs, however, require a more probing analysis.

A. Commonality

Fed. R. Civ. P. 23(a)(2) requires the plaintiffs to show that "there are questions of law or fact common to the class." As with all other aspects of Rule 23, the trial court must engage in a "rigorous analysis" to determine whether this prerequisite has been fulfilled. *Hartman*, 19 F.3d at 1473.

> As *Falcon* made clear, there is more to a showing of commonality than a demonstration that class plaintiffs suffered discrimination on the basis of membership in a particular group. . . . [A] plaintiff need not isolate the particular practice and prove that such practice *caused* the discrimination, [but] plaintiffs must make a significant showing to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the employer's challenged employment decisions.

Id. at 1472. As noted, plaintiffs must make a "specific presentation" that identifies the questions of law or fact common to the class representative and the putative class. *Wagner*, 836 F.2d at 589.

Plaintiffs' argument for commonality is threefold. First, they contend that in spite of Sodexho's decentralized system,

the promotion process is the same throughout the company. Second, they assert that this process is unfettered and subjective. Third, they allege that, as a result, the members of the putative class have been affected by these practices in the same way, by being denied promotions for which they were better qualified than the white employees who received them. As recognized by *Wagner*, 836 F.2d at 592, plaintiffs may rely on a combination of statistical and anecdotal evidence to support these assertions. *See Valentino v. USPS*, 674 F.2d 56, 68 (D.C. Cir. 1982) ("[C]lass action plaintiffs offer a combination of statistical proof and individual testimony of special instances of discrimination.").

The Court is satisfied that there are common questions of law and fact with respect to the class and its representatives. Plaintiffs have made a "significant showing" of a "common policy of discrimination" under *Hartman*, 19 F.3d at 1472. As previously explained, Sodexho's own witness on its promotion policies and practices confirmed that there are no company rules, guidelines, or criteria for hiring managers to follow, and that these supervisors are not required to take notes on interviews or to explain their choices. (Anstee Dep. at 81, 90-92, 182.) While it may be true, as defendants contend, that "[p]laintiffs challenge tens of thousands of employment decisions . . . made by thousands of managers, at thousands of work sites dispersed across the country" (Def. Opp. at 32), plaintiffs argue that these decisions are linked by Sodexho's company-wide policy of not having any consistent promotion policy, guidelines, or requirements. The testimony of Sodexho's own witness, as well as of other company employees, confirms that Sodexho's policy and practice is to allow each manager to

make promotion decisions based on whatever criteria he or she chooses, with no guidance or rules.

This anecdotal evidence is buttressed by plaintiffs' statistical evidence of discrimination in promotions. In particular, plaintiffs' statistics show that African Americans are significantly underrepresented in above-the-unit positions in comparison with lower-paying jobs at Sodexho, and that if promotions at the company were based on seniority, 265 more African Americans would hold above-the-unit jobs. This data also demonstrates that African-American managers at Sodexho are clustered in a small percentage of units, and are significantly more likely to report to another African-American manager. Plaintiffs' statistical expert concluded that this pattern of discrimination was company-wide and did not vary significantly by division. Thus, plaintiffs have made a "significant showing," *Hartman*, 19 F.3d at 1472, that Sodexho's lack of any uniform promotion policy or guidelines has had a disparate impact on the promotion of African-American employees, and has enabled or even fostered an environment at the company in which officials intentionally discriminate against blacks by denying them promotions to upper-level managerial positions.

To rebut this showing of a common policy, defendant offers essentially four arguments, none of which has merit at the class certification stage. First, it contends that its promotions are not determined based on entirely subjective criteria, because some individual hiring managers do consider objective criteria, and because some jobs have objective requirements, including a satisfactory performance evaluation, which in turn is based on objective criteria.

(*See* Def. Opp. at 35-36.)[18] These arguments, however, miss the point of *Falcon's* footnote 15, which carved out an exception to the across-the-board rule for "entirely subjective *decisionmaking processes*," rather than requiring entirely subjective hiring criteria. *Falcon*, 457 U.S. at 159 n.15 (emphasis added). Whether a particular manager uses objective criteria in making particular promotion decisions is irrelevant to the commonality analysis; instead, what is significant is that the determination of which criteria to use is left entirely to the individual manager. That is, although individual promotion decisions may in isolated cases be made based on some objective criteria, Sodexho's overall promotion practices remain entirely subjective, because the decision of whether to use objective criteria — and if so, which criteria to use — is a matter left to the discretion of the individual

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18. Defendant's examples of objective criteria include, *inter alia*, testimony of a supervisor that "[i]f I'm hiring for a management position, I ask them how many years of management have you had. If they say zero, that screened them out" (Def. Ex. 40, Dep. of Ezzie Henry ("Henry Dep.") at 88); the testimony of plaintiff Moss that education and supervisory experience are considered in some promotion decisions for salaried positions (Def. Ex. 19, Dep. of Chip Moss ("Moss Dep.") at 75-76); and the fact that certain job descriptions and the general MCMS guidelines include some objective criteria. (Def. Ex. 50-51 (MCMS guidelines state that employee "can only post for a job that is no more than 2 grade levels higher than your current grade [and] must have been in your current position a minimum of one year").) This final point about MCMS in particular misses the mark because it ignores plaintiffs' argument—and the statistics in support of this argument—that supervisors were not required to adhere to MCMS in making promotion decisions. *See supra* pp. 4-5.

manager.[19] *See Griffin v. Dugger*, 823 F.2d 1476, 1490 (11th Cir. 1987) ("entirely subjective" prong of *Falcon* implicated where employees "are promoted on the basis of their performance as viewed by their superiors").

Second, defendant argues that "a literal avalanche of decisions in the past three years has rejected class claims very similar to those of Plaintiffs," in which the defendant's decision-making processes were decentralized, or, for example, the putative class encompassed a broad geographic area. (Def. Surr. at 7-8.) In support, defendant cites numerous recent district cases from other jurisdictions in which class certification has been rejected. (*See* Def. Opp. at 31-32; Def. Surr. at 7-8.) This reliance is unpersuasive. In the first instance, this Circuit has spoken in detail on this issue, and has articulated the appropriate analysis for this Court.[20]

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19. Defendant's interpretation would, in effect, eviscerate the "entirely subjective" exception in footnote 15 of *Falcon*, because it would find commonality only in an entity in which a defined group of personnel actions existed in which every decision was based on purely subjective criteria.

20. For example, this Circuit noted that plaintiffs will often offer a combination of statistical and anecdotal evidence to demonstrate a common pattern of discrimination, and concluded that "it is hard to imagine how it could be otherwise." *Wagner*, 836 F.2d at 592-93. Defendant's reliance on two Northern District of Georgia cases, therefore, for the proposition that anecdotal evidence is not probative of discrimination is unhelpful, because the views expressed in those opinions conflict with the law of this Circuit. (*See* Def. Opp. at 39-40) (citing *Cooper v. Southern Co.*, 2001 U.S. Dist. LEXIS 16809, at *106-07 (N.D. Ga. Oct. 11, 2001); *Reid v. Lockheed Martin Aeronautics Co.*, 2001 U.S. Dist. LEXIS 11685, at *38-39 (N.D. Ga. 2001).)

Appendix B

Defendant's pleadings are notable for their lack of reference to *Wagner* and *Hartman*, the two leading cases in this Circuit. Moreover, motions for class certification are fact-specific, and therefore, the outcome of these motions will vary based on the specific facts of the case. Thus, despite the parties' protestations to the contrary, these factual distinctions mean that there is really no case on point.[21] Not surprisingly, then, the cases cited by defendant are distinguishable.[22] Plaintiffs

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21. As a result, and in light of the large number of Title VII class actions filed over the past several years, it is hard to imagine an area in which it is easier for the parties to find district court case law to cite for almost any proposition. Both parties have certainly done this. In response to the 15 district court cases denying class certification from the last three years cited by defendant (Def. Opp. at 31-32), plaintiffs have identified five other cases where commonality was found (Pl. Reply at 3-5), and they have also effectively distinguished this case from the ones cited by defendant. (*Id.* at 6-9.)

22. The Court need not address all of the cases cited by defendant, because it is governed by *Wagner* and *Hartman*. However, it is notable that defendant relies heavily on *Allen v. Chicago Transit Authority*, 2000 WL 1207408 (N.D. Ill. July 31, 2000), for the proposition that "[t]here are too many individual issues for there to be factual or legal issues common to the entire class." *Id.* at *8. Notwithstanding the difference between the interpretation of *Falcon* by courts in the Seventh Circuit, *see id.* at *8, and this Circuit, *Allen* is distinguishable from the instant action because in that case, 1) the fact that defendant's "managers [were] required to put the reasons for their decisions in writing," *id.* at *9, ensured that the decision-making process was not entirely subjective and unreviewable; 2) plaintiffs also claimed discrimination in pay, which made the commonality requirement more difficult to fulfill; and 3) plaintiffs appear to have offered no anecdotal evidence of discrimination beyond the specific claims of the class representatives, instead relying largely on statistics of under-representation. *Id.* at 9-10.

have defined their claims and class narrowly to include only discrimination in promotions, and only those individuals who sought either an above-the-unit position or a job that would lead to an above-the-unit position. And, as noted, they have made a preliminary showing through statistics and testimony that Sodexho's promotion practices with regard to this group of individuals is entirely subjective and perhaps discriminatory.[23] These differences distinguish this action from the cases cited by defendants. *See Valentino*, 674 F.2d at 68 ("The burden of comparing appropriate groups . . . is far more tractable when all members of the class are professional, administrative, or technical employees with generally similar job skills and seek advancement to positions involving those same skills.")

Perhaps more importantly, defendant's view of the commonality test would preclude class certification in an action against any company that has decentralized its personnel practices. Sodexho contends that a class cannot be certified "without identifying any centrally unifying general policy of discrimination," and that there can be no such policy when decision-making procedures are decentralized. (Def. Surr. at 7 (internal quotations omitted).) This position would permit companies to escape Title VII class actions by minimizing the amount of control that they exercise over individual managers. Such a holding would run afoul of the purpose of Title VII, which is "not to provide

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23. This showing renders irrelevant to the class certification motion any substantive differences in the work done by employees of the different divisions at Sodexho, especially when combined with plaintiffs' evidence that employees can and do apply for promotions across divisions.

redress but to avoid harm," by encouraging employers "to adopt antidiscrimination policies and to educate their personnel on Title VII's prohibitions." *Kolstad v. American Dental Association*, 527 U.S. 526, 545 (1999) (internal quotation omitted).

Third, defendant attacks Siskin's statistical evidence, both on its merits and as a matter of law. As noted, the Court should not pass on the merits of plaintiffs' statistical analysis at this stage, because such an analysis is "not relevant to the [class] certification determination." *Caridad*, 191 F.3d at 292; *see Wagner*, 836 F.2d at 593-95 (accepting plaintiffs' presentation of statistics in evaluating question of commonality). While defendant's contention that plaintiffs' statistics are flawed as a matter of law because they "are merely descriptive, do not provide any appropriate benchmarks, and [are] premised on an analysis of seniority alone" (Def. Opp. at 33) must be addressed, it is ultimately unavailing. Sodexho relies on *Coward v. ADT Sec. Sys., Inc.* 140 F.3d 271, 274 (D.C. Cir. 1998), to support this argument. There, this Circuit held that the "'[m]ajor factors' that a regression analysis[24] must include depend on the facts and theory of the particular case." *Id.* at 274 (quoting *Bazemore*, 478 U.S. at 400). Using that standard, the Court found plaintiffs' statistics to be invalid as a matter of law because they controlled only for

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24. Regression analysis is "a statistical method for making quantitative estimates of the effects of different factors on some variable of interest. The regression technique has come into vogue in employment discrimination cases as a means of estimating the discrete influence factors such as sex, experience, and education have had on determining salary level." *Valentino*, 674 F.2d at 70 (internal quotation and citation omitted).

race and seniority, even though "[a]ccording to their own theory of the case, [] job title, or some other measure of type of work, serve[d] as a major factor within the meaning of *Bazemore*, [because plaintiffs] claim that they should be compared to employees in other job categories who perform similar work but who earn more than they." *Id.* Such is not the case here. In the first instance, *Coward* considered the use of statistics to establish a prima facie case of discrimination on a motion for summary judgment, not to meet the less demanding "significant proof" standard on motion for class certification. *Wagner*, 836 F.2d at 589. Moreover, unlike *Coward*, plaintiffs' statistics are not "so incomplete as to be inadmissible as irrelevant." *Id.* Plaintiffs' claim is that discrimination at Sodexho has prevented African-American employees from advancing to high-level managerial positions. The two major factors related to this claim are therefore race and seniority, and plaintiffs' expert has controlled for these variables. Although Siskin did not control for education and experience by position, these factors are not essential to plaintiffs' argument, and their omission "will affect the analysis' probativeness, not its admissibility."[25]

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25. In *Bazemore*, on which this Circuit relied in *Coward*, the Supreme Court considered the use of statistical evidence in a discrimination case at trial. The Court found that "a regression analysis that includes less than all measurable variables may serve to prove a plaintiff's case." *Bazemore*, 478 U.S. at 400. Moreover, plaintiffs explain that they failed to control for education and experience because Sodexho has no computerized data that would allow them to be evaluated quantitatively. (Pl. Reply at 17 n.26; Def. Ex. 11, Haworth Response to Siskin Supp.Rep. ("Haworth Resp.") ¶ 28 n.14.) Here again, plaintiffs should not be penalized for defendant's lack of centralized controls and recordkeeping.

Bazemore, 478 U.S. at 400. Plaintiffs' statistics are therefore sufficient to support a finding of commonality.[26]

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26. Relying on *Moore* and *Valentino*, defendant also challenges plaintiffs' statistics on the ground that they confuse underrepresentation for discrimination. In *Moore*, plaintiffs based their discrimination claim on a comparison of the percentage of African Americans at one salary level with those at the next highest level. The court found no likelihood of success on the merits in large part because the analysis from that data assumed, without basis, that all African Americans at the lower level were eligible for promotion. *Moore*, 113 F. Supp. 2d at 20. In *Valentino*, the Court found that plaintiffs had not established a prima facie case of classwide gender discrimination because the statistics "generally repeat [ed] the same theme: . . . there are a larger percentage of women in the lower levels than in the upper levels, . . . [but] provide[d] no basis for comparing men and women similarly educated and equipped to pursue the same occupations." *Valentino*, 674 F.2d at 69-70 (internal quotation omitted). *See Metrocare v. WMATA*, 679 F.2d 922, 930 (D.C. Cir. 1982) (statistics failed to establish a prima facie case of race discrimination because they failed to "compare the percentage of blacks hired for given jobs with the percentage of blacks qualified for those positions"). However, whether that critique applies to plaintiffs' statistical evidence is not determinative of a motion for class certification, because at this stage plaintiffs' burden "entails more than the simple assertion of commonality and typicality, but less than a prima facie showing of liability." *Reid*, 205 F.R.D. at 666 (internal quotation omitted). In both *Valentino* and *Metrocare*, the courts rejected plaintiffs' statistical evidence at trial, long after plaintiff classes had been certified; in *Moore*, the court was determining the likelihood of success on the merits at the preliminary injunction stage. Whether plaintiffs can ultimately make out a prima facie case of classwide discrimination is not the issue here; rather, they must make only a "significant showing" to that effect. *Hartman*, 19 F.3d at 1472.

Fourth, defendant asserts that the continuing violation doctrine defeats commonality. Under Sodexho's interpretation of the complaint, plaintiffs are seeking damages for injuries that occurred before the limitations period. Whether they would be permitted to do this under the "continuing violation" doctrine would, defendant contends, need to be addressed on an individual basis. Although plaintiffs' invocation of a "continuing violation" in both the complaint and its motion for class certification is somewhat ambiguous (*see* Complaint ¶ 90; Pl. Mem. at 26 n.26), plaintiffs have made clear in their reply brief that they seek damages only for injuries suffered beginning in March 1998 — though the injury may have been caused by a pattern of discrimination that started before then. (Pl. Reply at 13.) *See Bazemore*, 478 U.S. at 396. To the extent that evidence of discrimination from before March 1998 is relevant to the determination of liability, there are questions of law and fact common to the class, because this evidence would be offered to prove the ongoing practice of discrimination that plaintiffs have alleged. This continuing violation doctrine thus has no effect on the question of commonality with respect to liability.[27]

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27. With regard to the remedial phase, events occurring before March 1998 may affect the damages of different class members in different ways, which could in turn impact the Court's ability to certify the class under Rule 23(b) for the purpose of determining a remedy. Because the class is being certified only for liability at this time, however, the Court need not address the effect of the continuing violation doctrine on the class for remedial purposes.

Appendix B

B. Typicality

Next, plaintiffs must show that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "The commonality and typicality requirements of Rule 23(a) tend to merge." *Falcon*, 457 U.S. at 158 n.13. "[T]he court must consider whether [the class representatives] suffered injury from a specific discriminatory promotional practice of the employer in the same manner that the members of the proposed class did, and whether [the class representatives] and the class members were injured in the same fashion by a general policy of employment discrimination." *Wagner*, 836 F.2d at 591; *see Paxton v. Union Nat'l Bank*, 688 F.2d 552, 562 (8th Cir. 1982) ("Typicality is not defeated because of the various promotional opportunities at issue, or the differing qualifications of plaintiffs and class members.")[28]

The analysis of commonality applies equally to typicality. Because plaintiffs have made a convincing showing of a common policy of discriminatory treatment that extends across divisions, units, and geographic regions, including those where the proposed representatives worked, they have made a sufficient demonstration that the claims of the class representatives are largely typical of those of the class.

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28. Contrary to plaintiffs' assertion (*see* Pl.Mem. at 37), the statement articulated in *Paxton* was not adopted by this Circuit, but was instead merely noted in *Wagner* in a footnote as a "see also" cite. *Wagner*, 836 F.2d at 591 n.82.

Plaintiffs have failed, however, to show typicality in one respect. The ten class representatives worked at MMS before it merged with SUSA on March 27, 1998, and then continued their employment with the merged entity. None of them worked at SUSA. Yet plaintiffs' class allegations date from March 9, 1998 — 18 days before the formation of Sodexho. While plaintiffs have satisfied their burden of showing a common policy of discrimination with respect to their own claims and those of the class members who worked at Sodexho, they have offered no evidence about the policies and practices of SUSA except for a limited description of that entity's posting system. Moreover, plaintiffs' evidence of discrimination before the merger is somewhat limited. Plaintiffs have not explained whether their statistics that predate the merger apply to MMS, to SUSA, or to both companies, and the majority of plaintiffs' anecdotal evidence of discrimination describes events occurring after March 27, 1998. Without more, the Court is unwilling to infer that the statistical and anecdotal evidence of discrimination put forth by the plaintiffs with regard to Sodexho applies as well to MMS and SUSA. And since no named plaintiff worked at SUSA, there is no representative of the putative class who was employed at that entity before the merger. The Court therefore finds that the class representatives' claims are typical of those of all members of the class following the formation of Sodexho on March 27, 1998, but not of claims that predate the merger.[29] As a result, the Court will limit the

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29. For the same reasons, plaintiffs have failed to show commonality with respect to claims that arose before the merger. Moreover, as the unrebutted testimony offered by defendant of Sodexho's Vice President of Human Resources indicates, MMS and

(Cont'd)

class period to include only claims against Sodexho beginning on March 27, 1998.[30]

C. Adequacy

"The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. A 'class representative must be part of the class and possess the same interest and suffer the same injury as the class members.'" *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997) (quoting *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)) (internal citations omitted). This Circuit has explained that "[b]asic consideration of fairness require[s] that a court undertake a stringent and continuing examination of the adequacy of representation by the named class representatives at all stages of the litigation where absent members will be bound by the court's judgment." *National Association for Mental Health, Inc. v. Califano*, 717 F.2d

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(Cont'd)

SUSA operated under disparate payroll and pay scale systems prior to the merger. (Newmier Decl. ¶¶ 6-7.) The administrative burden of extending the class period back to include the predecessor companies for 18 days before the merger therefore far outweighs any benefit to the plaintiffs, and would necessarily present "undue [ ] complication in the presentation of evidence." Fed. R. Civ. P. 23(d)(1).

30. Although none of the named plaintiffs worked in the Laundry or Canada divisions, the Court finds that the claims of the proposed representatives are typical of employees of those divisions, because, as noted, plaintiffs have demonstrated that the discriminatory practices they challenge occur throughout the company.

1451, 1457 (D.C. Cir. 1983) (citing *National Association of Regional Medical Programs, Inc. v. Mathews*, 551 F.2d 340, 344-45 (D.C. Cir. 1976)). In evaluating whether a named plaintiff will fairly and adequately protect the interests of the class members, this Circuit has "considered two principal requirements: 1) the named representative must not have antagonistic or conflicting interests with the unnamed members of the class, and 2) the representatives must appear able to vigorously prosecute the interests of the class through qualified counsel." *Id.* at 1458. Defendant attacks only the first prong of this test, since they do not dispute counsel's impressive experience and qualifications.

The leading case in this Circuit on the question of conflict of interest is *Phillips v. Klassen*, 502 F.2d 362 (D.C. Cir. 1974). There, the Circuit traced the development of the use of a class action as background for its discussion of the necessity of adequate representation by the lead plaintiffs.

> Class members whose interests are antagonistic in fact to, or even "potentially conflicting" with, the interests of the ostensibly representative parties cannot be bound, consistent with the requirements of due process to an adjudication taken in their name. Where courts discern that the interests of the named plaintiff are in significant part antagonistic to those of the class he purports to represent, they decline to entertain the action as a class action.

Id. at 366 (quoting *Hansberry v. Lee*, 311 U.S. 32, 41-42 (1940)) (internal citation omitted). Given the difficulty in

divining the interests of the absent class members, the *Phillips* Court instructed trial courts to focus on the remedies sought by the named plaintiffs and to determine whether the same relief would also likely be desired by the rest of the class.

> In order to maintain a class suit, plaintiffs must be truly representational. Unless the relief sought by the particular plaintiffs who bring the suit can be thought to be what would be desired by other members of the class, it would be inequitable to recognize plaintiffs as representative, and a violation of due process to permit them to obtain a judgment binding absent plaintiffs.

Id. (quoting *Dierks v. Thompson*, 414 F.2d 453, 456 (1st Cir. 1969)) (internal citation omitted).

Implicit in *Phillips* is the requirement that only those conflicts of interest that relate to the subject matter of the lawsuit are relevant to the adequacy determination. This principle has been widely recognized, *see, e.g.*, *Johns v. Rozet*, 141 F.R.D. 211, 217 (D.D.C. 1992); *In re Cardizem CD Antitrust Litigation*, 200 F.R.D. 297, 306 (E.D. Mich. 2001); *Caranci v. Blue Cross & Blue Shield of Rhode Island*, 194 F.R.D. 27, 41 (D.R.I. 2000); *Walsh v. Northrop Grumman Corp.*, 162 F.R.D. 440, 445-47 (E.D.N.Y. 1995); *Riordan v. Smith Barney*, 113 F.R.D. 60, 64 (N.D. Ill. 1986), including in discrimination class actions. *See Allen v. Isaac*, 99 F.R.D. 45, 55 (N.D. Ill. 1983); *Turner v. A.B. Carter, Inc.*, 85 F.R.D. 360, 364 (E.D. Va. 1980). Sodexho contends that the proposed class representatives are inadequate because some

of them are "claiming race discrimination and seeking damages based on the actions [of] other class representatives or class members." (Def. Opp. at 13.) Specifically, defendant argues that several of the named plaintiffs seek damages for discrimination involving decisions by other proposed representatives or African-American managers. (*Id.*) Sodexho also asserts that the named plaintiffs and members of the putative class have necessarily given performance evaluations that impacted promotion decisions. (Def. Surr. at 9.) Defendant alleges that these conflicts are insurmountable, and that the proposed representatives are therefore inadequate.

Sodexho relies on *Wagner*, in which this Circuit affirmed the lower court's denial of a motion to certify a class of all "professional, administrative, and technical employees graded GS-9 and above" at the Interstate Commerce Commission. *Wagner*, 836 F.2d at 581. Although the Court rested largely on plaintiffs' failure to establish commonality, it also questioned the adequacy of the proposed representatives due to potential conflicts within the class.

> Supervisory employees are often inappropriate representatives of nonsupervisory employees because the structure of the workplace tends to cultivate distinctly different interests between the two groups. Although each group shares the interest in freedom from discrimination, potential conflicts may and do arise within a class including both. In the instant case, supervisors who are members of the proposed class have been responsible for evaluating the performances of other members of the class; indeed, the very

> individual on whose behalf injunctive relief is sought in this case was allegedly discharged by a black employee who is a potential member of the class. Additionally, [plaintiff] has accused his own supervisor, who is a potential class member, of racial discrimination. . . .

Id. at 595. The holding of *Wagner* has been interpreted to mean that "the existence of a supervisory relationship between class members *could* undermine the adequacy of the representation of the class members in that relationship." *In re Pepco Employment Litigation*, 1992 WL 442759, at *22 (D.D.C. Dec. 4, 1992) (emphasis added). In *Pepco*, one proposed class representative alleged that his "black supervisor, a member of the class, discriminatorily denied him promotions, and [a second] proposed class representative [] allege[d] his supervisor, [the first proposed class representative], discriminatorily denied him promotions and raises." *Id.* Faced with these existing conflicts, the court refused to certify the proposed class.

The allegations presented here differ significantly from the facts in *Wagner* and *Pepco*. Although their deposition testimony is confusing in spots, plaintiffs have not alleged discriminatory treatment by other potential class members with respect to promotions. (*Compare* McNish Dep. at 13-29 *with* 179-80; Howell Dep. at 15-16, 102-03 *with* 206-07; Henry Dep. at 26-29 *with* 50-51, 71-72; Hardy Dep. at 64-67 *with* 72-73.) To the extent that plaintiffs, as defendant notes, "supervised other African-American class members[,] bore significant [human resources] responsibilities over them, ranging from performance evaluations to discipline and

termination[,] and . . . reported to African-American managers at some time" (Def. Opp. at 14), these work relationships do not rise to the level of conflicts that preclude the named plaintiffs from adequately representing the interests of the class. The mere fact that some putative class members were involved in the supervision and rating of other class members does not mean that the supervising class members perpetuated or contributed to any of Sodexho's alleged discriminatory policies.[31] *See Hyman v. First Union Corp.*, 982 F. Supp. 1, 5 (D.D.C. 1997) (adequacy element satisfied where no plaintiffs brought claims of discrimination against other plaintiffs and "even if the evaluations [of some supervisor plaintiffs] had an[] impact on the [] decisions [to terminate other class members], it was a negligible impact").

In light of the absence of specific allegations of discrimination by class members against other class members, and because "the relief sought by the particular plaintiffs who bring the suit can be thought to be what would be desired

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31. Moreover, defendant's suggestion that the adequacy prong could not be met where "class members competed against other class members for promotions" (Def. Opp. at 43), has been characterized as an "absurd proposition [that] would of course doom almost every class action charging discrimination in promotion or hiring. . . ." *Hartman v. Duffy*, 158 F.R.D. 525, 547 (D.D.C. 1995) (citing *Meiresonne v. Marriott Corp.*, 124 F.R.D. 619, 625 (N.D. Ill. 1989)). Indeed, defendant's view of adequate representation is so narrow that the only potential Title VII class that could be certified would have to be composed of black employees on exactly the same pay scale, none of whom ever supervised — or were supervised by — another black employee. This view is plainly far too restrictive.

by other members of the class," *Phillips*, 502 F.2d at 366, the holding of Judge Lamberth in *Neal v. Moore*, 1994 U.S. Dist. LEXIS 21339 (D.D.C. Dec. 23, 1994), applies. "[S]upervisors and non-supervisors alike will be able to come forward with evidence of their specific injuries and appropriate relief. Furthermore, an injunction against a few supervisory members of the class — who most likely did not exert significant influence over departmental policy-making — is fairly characterized as de minimis relative to the value of such an injunction in protecting those same supervisors from epidemic discrimination." *Id.* at *46-47. In fact, *Neal* applies with particular force here because plaintiffs' allegations — which the Court has found to be sufficiently substantiated to support a finding of commonality — are that Sodexho's discriminatory practices have subjected African Americans to a glass ceiling. To thwart a class action because of the presence of both supervisors and non-supervisors in the class would actually reward defendant for its alleged discrimination.[32]

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32. Defendant's reliance on *Wagner*, *Pepco*, and the other post-*Wagner* cases it cites in support of its adequacy argument — *Donaldson v. Microsoft*, 205 F.R.D. 558, 568 (W.D. Wa. 2001); *Allen*, 2000 U.S. Dist. LEXIS 11043, at *36; and *Appleton v. Deloitte & Touche L.L.P.*, 168 F.R.D. 221, 233 (M.D. Tenn. 1996) — is misplaced for another reason. None of these cases denied class certification solely on the basis of adequacy by intraclass conflicts. In each case, the Rule 23(a)(4) analysis was merely "another factor that weigh[ed] against certification." *Appleton*, 168 F.R.D. at 233.

Appendix B

III. Rule 23(b) Analysis

Plaintiffs have moved to certify the class under Fed. R. Civ. P. 23(b)(2), or alternatively, under Fed. R. Civ. P. 23(b)(3).[33] Central to the Rule 23 analysis are the remedies sought by plaintiffs. In this case, they have requested a declaratory judgment; permanent injunctions significantly restructuring Sodexho's system for promoting employees and implementing anti-discrimination initiatives;[34] job relief, such as reassignment, for plaintiffs and class members; and monetary relief, including back pay, and compensatory and punitive damages. (Complaint at 51-54.)

As noted, Rule 23(b)(2) permits class certification if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). "While the rule itself is silent as to whether and to what extent monetary relief may also be sought, the Advisory Committee Notes on Rule 23 state that (b)(2) certification 'does not extend to cases in which the appropriate final relief relates

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33. Because the Court will certify a class under Rule 23(b)(2) for the purpose of determining liability, it need not address the parties' Rule 23(b)(3) arguments.

34. Some of the aspects of the proposed injunction — regarding, for example, "the selective and arbitrary use of merit bonuses" (Complaint at 52, ¶ B(8)) — appear to go beyond the scope of the classwide discrimination alleged by plaintiffs.

exclusively or predominantly to money damages.'" *Taylor v. District of Columbia Water & Sewer Authority*, 205 F.R.D. 43, 47 (D.D.C. 2002) (quoting Fed. R. Civ. P. 23 (Advisory Committee Notes)). The Notes also "explicitly state that 'cases in the civil-rights field' are 'illustrative' of the class actions meant to be certified under Rule 23(b)(2)." *Stewart v. Rubin*, 948 F. Supp. 1077, 1089 (D.D.C. 1996) (quoting Fed. R. Civ. P. 23 (Advisory Committee Notes)); *see Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Consequently, "Title VII and other civil rights class actions are frequently certified pursuant to Rule 23(b)(2)." *Eubanks v. Billington*, 110 F.3d 87, 92 (D.C. Cir. 1997).

At this stage, it is appropriate to certify this class pursuant to Rule 23(b)(2) for the purpose of determining liability. Any finding of liability is tied to the actions of Sodexho with respect to the class as a whole, and any subsequent injunctive or declaratory relief would have a significant impact on the company's policies and practices in relation to the entire plaintiff class. At the same time, however, plaintiffs' request for damages — including back pay — makes (b)(2) certification of the remedy phase unwise at this stage. As this Circuit noted, "the underlying premise of (b)(2) certification — that the class members suffer from a common injury that can be addressed by classwide relief — begins to break down when the class seeks to recover back pay or other forms of monetary damages to be allocated based on individual injuries." *Eubanks*, 110 F.3d at 95. The Court will therefore bifurcate the case, certifying a(b)(2) class for liability. If liability is established, the Court will then determine the most

appropriate mechanism for determining remedies.[35] *See Eubanks*, 110 F.3d at 96 n.14; *Pigford v. Glickman*, 182 F.R.D. 341, 351 (D.D.C. 1998); *Neal*, 1994 U.S. Dist. LEXIS 21339, at *42-44, *57.

CONCLUSION

For the aforementioned reasons, plaintiffs' motion for class certification is granted as to liability, although the class period will be limited to begin with the formation of Sodexho on March 27, 1998.

s/ Ellen Segal Huvelle
ELLEN SEGAL HUVELLE
United States District Judge

Dated: 6/25/02

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35. At the remedy phase, for example, "the court may adopt a 'hybrid' approach, certifying a (b)(2) class as to the claims for declaratory or injunctive relief, and a (b)(3) class as to the claims for monetary relief . . . [or] the court may conclude that the claims of particular class members are unique or sufficiently distinct from the claims of the class as a whole, and that opt-outs should be permitted on a selective basis." *Eubanks*, 110 F.3d at 96. *See Thomas v. Albright*, 139 F.3d 227, 234-36 (D.C. Cir. 1998). Because the Court will not certify the class for the remedial stage at this time, it need not address defendant's argument that this Court should follow the Fifth Circuit's decision in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), which held that "[m]onetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief." *Id.* at 415.

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 01-510 (ESH)

CYNTHIA CARTER MCREYNOLDS, et al.,

Plaintiffs,

v.

SODEXHO MARRIOTT SERVICES, INC.,

Defendant.

ORDER

Based on consideration of plaintiffs' motion for class certification, defendant's opposition, an the entire record contained therein, and for the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that the motion for class certification [34-1] is **GRANTED** for the purpose of determining liability, except that the class period will be limited so as to commence with the formation of the merged entity Sodexho on March 27, 1998; and it is

Appendix B

FURTHER ORDERED that the parties shall appear before the Court on July 12, 2002, at 9:45 a.m. for a status conference. Five days prior to the conference, the parties shall submit a joint proposal setting forth a schedule for liability-related discovery.

SO ORDERED.

s/ Ellen Segal Huvelle
ELLEN SEGAL HUVELLE
United States District Judge

Dated: 6/25/02

APPENDIX C — RULE INVOLVED

UNITED STATES CODE ANNOTATED FEDERAL RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS IV. PARTIES

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would

establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members

of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of

the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

No. 02-1731

Supreme Court, U.S.
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In The
Supreme Court of the United States

SODEXHO MARRIOTT SERVICES, INC.,

Petitioner,

v.

CYNTHIA CARTER MCREYNOLDS, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KERRY ALAN SCANLON*
DAVID O. BICKART
STEVEN S. ROSENTHAL
T. MELINDAH BUSH
NICOLE J. BECTON
KAYE SCHOLER LLP
901 15th Street, N.W., Suite 1100
Washington, DC 20005
(202) 682-3500
Attorneys for Respondents

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Should this Court review a decision by the court of appeals denying an interlocutory appeal under Rule 23(f) of the Federal Rules of Civil Procedure, where the decision is one committed to the sole and unfettered discretion of the courts of appeals?

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COUNTER-STATEMENT OF THE CASE[1]

This employment discrimination case challenges a promotion process that used to be common 40 and 50 years ago. Supervisors and senior officials, who are overwhelmingly white, have been given free reign to handpick their selections from lower management ranks without a competitive posting process, without using any predetermined selection criteria and without recording why they selected their favored promotion candidates and rejected or declined to consider disfavored candidates. A leading industrial psychologist described this system as "lax and corruptible," and prone to discrimination against racial minorities. Prien Rep. ¶ 4, Exhibit 11 to Motion for Class Certification, Docket No. 34.[2] No one should be surprised that the company's "good old boy network," as some of its white managers described it, did in fact discriminate against black managers. Hendrickson Dep. at 164, 166, 184, Exhibit 7 to Motion for Class Certification, Docket No. 34. Racism flourished in this system and the company's own human resources personnel, including a corporate vice president, agreed that the supervisors involved in most of the promotion decisions "won't hire [black people]." Petitioner's Appendix (hereinafter "Pet. App.") B at 11a.

The Respondents charge that the Petitioner, Sodexho Marriott Services, Inc. ("Sodexho"), has denied its African-American managers promotions and promotion

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[1] This Counter-Statement of the Case, accompanied by record citations, is submitted in response to Petitioner's Statement of the Case, which is devoid of record citations.

[2] The record citations in this brief are to the district court record and docket numbers because no record on appeal was created.

opportunities, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* and the Civil Rights Act of 1866, 42 U.S.C. § 1981, in the following ways, among others: "(1) positions are filled without being posted at all; (2) when jobs are posted, favored employees are preselected for the positions; and (3) when 'more than one person is actually considered for an opening, hiring managers have virtually total discretion in their promotion decisions because they are not given job-related or objective criteria and are not required to document the reasons for their decisions, making them unreviewable.'" Pet. App. B at 9a-10a. The Complaint further alleges that Sodexho's African-American managers face a "glass wall" as well as a "glass ceiling," because they have been shunted into dead-end "black" accounts that serve and are supervised mostly by African-Americans. *See* Class Complaint at ¶ 24k, 27, Docket No. 1. The Complaint seeks extensive and highly detailed injunctive relief, including requiring Sodexho to adopt and implement a validated promotion selection procedure, including job posting and interview policies and to keep records of its selection criteria and its promotion decisions. *Id.* at 52-54. The Complaint also seeks back pay and compensatory and punitive damages. *Id.* at 54.[3]

[3] The Complaint seeks no particular amount of damages, let alone the $1 billion cited in the Petition, Pet. at 4, which assumes without a shred of record support that every class member would recover $300,000 – the statutory maximum under Title VII. The Petition provides no record support for this assumption, and the only class member testimony relied on by Petitioner in the District Court merely observed that the amount of damages was for a jury to decide. *See, e.g.*, Richardson Dep. at 214-21, Exhibit 98 to Motion for Class Certification, Docket No. 34.

After six months of discovery, the respondents moved to certify the case as a class action on behalf of all adversely impacted African-American salaried employees at Sodexho or its predecessors during the class period who held or sought to hold upper-level managerial or supervisory positions or jobs leading to those positions. *See* Pet. App. B at 10a. Petitioner estimated that 2,600 Sodexho employees are included in the certified class and Respondents do not dispute that the number of class members is roughly in the range of a few thousand.

Under D.C. Circuit law applying this Court's holding in *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147 (1982), the class representatives are required to make a "significant showing" that Sodexho's promotion practices operated under a "common policy" of discrimination. *Hartman v. Duffey*, 19 F.3d 1459, 1472 (D.C. Cir. 1994) (citing *Wagner v. Taylor*, 836 F.2d 578, 589 (D.C. Cir. 1987)). Pet. App. B at 27a-28a, 32a. In evaluating whether Respondents made a "significant showing," the district court considered nine volumes of Sodexho documents, depositions, transcripts and expert reports. *Id.* at 3a. The portrait that emerged from this "comprehensive record," *id.*, was of a promotion process that was typical of the early 1960s, which is rife with the risk that managers, exercising unlimited and unreviewable discretion, will continue promoting white employees to higher positions previously occupied by whites and keeping black employees in lower-level positions traditionally held by blacks.

Sodexho's selection procedures do not represent, as Petitioner suggests, merely "decentralized" decisionmaking. Instead, as the district court found, "the testimony of Sodexho's own witness, as well as that of other company employees confirms that Sodexho's policy and practice is to

allow each manager to make promotion decisions based on whatever criteria he or she chooses, with no guidance or rules." *Id.* at 31a-32a. Sodexho's hiring managers have "complete discretion" to decide whom to interview for each position. *Id.* at 9a. They are subject to no rules and are given no guidelines on how to evaluate or rank those promotion candidates that they do interview. *Id.* And they typically keep no notes or other documentation to explain their selection. *Id.* Upon reviewing this system, whose elements Sodexho's own witnesses repeatedly confirmed, one of this country's foremost industrial psychologists testified that in 40 years he had never encountered a company of Sodexho's size with such "lax and corruptible selection criteria and procedures." Motion for Class Certification at 1, Docket No. 34.

The D.C. Circuit has long recognized that promotion systems, like Sodexho's, that are "unchecked," "unvalidated" and "subjective" present a great risk of racial bias when the decisionmakers are predominantly white. *See, e.g., Cook v. Boorstin*, 763 F.2d 1462, 1472 (D.C. Cir. 1989); *Segar v. Civiletti,* 508 F. Supp. 690, 706 (D.D.C. 1981), *aff'd*, 738 F.2d 1249 (D.C. Cir. 1984).[4] However, Respondents did not rely solely on facts that showed a risk of

[4] Sodexho's class certification opposition ignored these controlling precedents. Its petition for certiorari compounds its earlier error by misstating that the district court found a "lack of controlling precedent" on whether subjective selection criteria may represent a common issue of fact or law supporting certification under Fed. R. Civ. P. 23(a). Pet. at 23. The "controlling precedent" which the district court found lacking consisted of *district court* opinions in *other circuits* upon which Sodexho had relied. These opinions were not "controlling" because they involved very different facts. Pet. App. B at 35a.

bias. They presented, and the district court considered, admissions by high-ranking Sodexho managers that their company's promotion system was indeed "corrupt." For example, human resource managers from across the country, who work closely with the promotion system, admitted that "our district managers won't hire black people." Pet. App. B at 11a-12a. Sodexho's top official and corporate representative for equal employment opportunity issues testified that the sparse number of "African-American promotions 'indicated a problem' and 'would be considered low.'" *Id.* at 11a. A senior-level white manager also provided several examples of preselection of white managers for promotions and racist statements by other white upper-level managers, such as "African Americans were genetically inferior to whites, and genetically most of the criminals in the world were African Americans, and that they didn't deserve to have promotions." *Id.* at 12a.

Contrary to Sodexho's unsupported assertions in its petition about its "aggressive pursuit of affirmative action," Pet. at 5, the record also shows, and the district court found, that Sodexho's top managers admitted that they had a problem promoting blacks to upper-level jobs but did nothing to remedy the problem. They tried instead to cover it up. For example, in 1995, company executives "were made aware of the lack of African-Americans" in upper-level jobs by members of the company's own diversity roundtable group, yet they did nothing to address or remedy the problem. Pet. App. B at 12a-13a. In fact, a Sodexho executive refused to permit a class member to

review its workforce diversity data because "the numbers really don't look very good." *Id.* at 13a.[5]

The Respondents buttressed their showing of class-wide discrimination with a statistical analysis of Sodexho's company-wide promotion data by Dr. Bernard Siskin, whose opinions Petitioner *concedes* satisfy Fed. R. Evid. 702, *i.e.*, are "based upon sufficient facts or data," are the "product of reliable principles and methods" and have been applied "reliably to the facts of the case." Pet. at 8 (conceding that Dr. Siskin's report satisfied threshold for admissibility). Dr. Siskin concluded that Sodexho's company-wide promotion process had resulted in statistically significant racial disparities in promotions adverse to African-Americans. *See* Pet. App. B at 15a-16a. After examining over 10,000 promotions from 1995-2001, Dr. Siskin estimated, with a high degree of confidence (statistically significant at more than eight standard deviations, far

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[5] Sodexho also argues, with no record citation whatsoever, that its "employment practices have been reviewed numerous times by the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") and have repeatedly received a clean bill of health." Pet. at 5. However, Sodexho's own corporate witness for equal employment opportunity and affirmative action issues admitted that although the Department of Labor requires annual affirmative action plans for each individual unit with more than 50 employees, of which Sodexho has hundreds, Petitioner has produced only about 20 affirmative action plans ("AAPs"), none of which covered more than a single year. *See* Watkis Dep. v.2 at 181-83, Exhibit 4 to Motion for Class Certification, Docket No. 34. Those AAPs appear to have been created only in response to the handful of audits by the OFCCP for a few individual units. Such threadbare affirmative action compliance is hardly "aggressive," but instead falls short of even the basic affirmative action requirements. Moreover, an OFCCP audit of only a handful of units cannot be construed as a "clean bill of health."

above the 1.96 standard deviations which the D.C. Circuit has accepted) that African-Americans had received far fewer promotions than one would expect in a race-neutral promotion process. *See* Pet. App. B at 15a-16a & n.12; Siskin Rep. at ¶¶ 24, 33, Exhibit 9 to Motion for Class Certification, Docket No. 34; Siskin Supp. Rep. at ¶ 6, Exhibit 50 to Motion for Class Certification, Docket No. 34. The district court recognized that under controlling D.C. Circuit precedent, such a statistically significant disparity, standing alone, is sufficient to establish the presence of a class-wide discriminatory practice. Pet. App. B at 16a n.12 (citing *Anderson v. Zubieta*, 180 F.3d 329, 339-40 (D.C. Cir. 1999)). Dr. Siskin's analysis also supported the plaintiffs' "glass wall" allegation. He found that African-American managers are segregated by race into predominantly "black accounts," with nearly two-thirds of all African-American managers in large accounts concentrated in less than ten percent of those accounts, while two-thirds of those accounts (596 out of 878) have no African-American managers at all. *See id.* at 16a.

The district court declined Petitioner's request to weigh Dr. Siskin's analysis against the competing analysis of the same data offered by its expert. Although the district court ruled that the case law did not support weighing conflicting expert opinions at the class certification stage, *id.* at 13a-14a and n.10, it nevertheless considered Sodexho's criticisms of Dr. Siskin's statistical analysis that have now been recycled in the certiorari petition. First, contrary to Sodexho's contention that Dr. Siskin "failed to assess whether the shortfall [of African-American promotions] was national in scope or was limited to particular divisions, regions, or local operating units," *see* Pet. at 4, the district court recognized that he

had indeed found that these statistically significant racial disparities existed company-wide. *See* Pet. App. B at 17a. Next, the district court rejected Petitioner's criticism, which it raises again in this Court, that Dr. Siskin failed to consider whether disparities in education or work experience explained the racial disparity in promotions. *See* Pet. at 8-9. Because Sodexho had no computerized data on education or work experience that an expert could use, the district court refused to "penalize" respondents for Sodexho's own "lack of centralized controls and record keeping." Pet. App. B at 38a n.25.[6]

The district court also rejected Petitioner's contention that the class representatives were inadequate, because the class potentially included managers who had supervised other class members. *Id.* at 48a-49a. Consistent with other district court decisions in the circuit, the district court read the leading D.C. Circuit decision on intra-class conflicts to require a case-by-case evaluation of the impact of a potential conflict among supervisors on the class member's adequacy, and on the particular facts of *this*

[6] The testimony of its statistical expert, Dr. Haworth, was neither (as described by Sodexho) more "objective" nor "more accurate" (Pet. at 5, 6) than Dr. Siskin's. To take but one example, Dr. Haworth unaccountably assumed the *only* qualified candidates for "open" positions came from those few, other units from which successful candidates had previously been selected. For example, Dr. Haworth's "pool" of two white managers who were, by her assumption, the only ones "available" for a position at American University in Washington, D.C., *included* a white man from North Carolina, who was selected for the job, and *excluded* 31 blacks in the same job category in the Washington, D.C. area, five of whom already worked at American University. *See* Siskin Decl. at ¶ 4, Exhibit 92 to Respondent's Reply Memorandum In Support of Its Motion for Class Certification, Docket No. 47.

case, found the potential for conflict to be minimal. *Id.* at 47a (citing *Wagner v. Taylor*).

Therefore, the district court found that Respondents had "made a 'significant showing' [as required by D.C. Circuit precedent] that Sodexho's lack of any uniform promotion policy or guidelines has had a disparate impact on the promotion of African-American employees, and has enabled or even fostered an environment at the company in which officials intentionally discriminate against blacks by denying them promotions to upper-level managerial positions." *Id.* at 32a. On June 25, 2002, the Court certified, for liability purposes only, a class of African-American managers employed by Sodexho since March 27, 1998. *Id.* at 3a-4a, 53a-54a. Pending a determination on liability, the Court deferred decision on certifying any remedial issues, such as those involving back pay or any other monetary relief. *Id.* at 51a-52a.

On July 10, 2002, Petitioner filed a Rule 23(f) petition for interlocutory appeal, which the court of appeals denied because it did not present "any 'unsettled and fundamental issue[s] of law relating to class actions, important both to the specific litigation and generally, that [are] likely to evade end-of-the-case review.'" Pet. App. A at 1a-2a. Sodexho now seeks review of the court of appeals' discretionary order denying its Rule 23(f) petition.

REASONS FOR DENYING THE WRIT

A. The Court of Appeals' Decision Not to Accept Sodexho's Petition for Interlocutory Review Was Committed to that Court's Discretion and Does Not Warrant This Court's Review

With very limited exceptions, the U.S. courts of appeals have jurisdiction to review only "final" district court orders, and district court orders granting or denying class certification are "interlocutory," not "final." In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), this Court held that class certification orders are not reviewable unless both the district court certifies the order under 28 U.S.C. § 1292(b) and the would-be appellant persuades the court of appeals that "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." 437 U.S. at 475 (quoting *Fisons, Ltd. v. United States,* 458 F.2d 1241, 1248 (7th Cir. 1972)). *Coopers & Lybrand* recognizes that section 1292(b)'s screening procedure requires separate, independent discretionary decisions by the district court and the court of appeals. *Id.* at 474-75. Thus, even if the district court exercises its discretionary power to recommend an interlocutory appeal, "[t]he appellate court may deny the appeal for any reason, including docket congestion." *Id.* at 475.

Congress subsequently amended the Rules Enabling Act to authorize this Court to "prescribe rules . . . to provide for an appeal of an interlocutory decision to the Courts of Appeals." Pub. L. No. 102-572, § 101, 106 Stat. 4506 (codified as 28 U.S.C. § 1292(e)). The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States then proposed, and this Court adopted, a new Civil Procedure Rule 23(f), which allows a

court of appeals "in its discretion [to] permit an appeal from an order of a district court granting or denying class action certification. . . . " Fed. R. Civ. P. 23(f). Rule 23(f) was "designed on the model of § 1292(b)," and it built upon § 1292(b) jurisprudence. Proposed Amendments to the Federal Rules of Civil Procedure, 167 F.R.D. 523, 565 (1996). The new rule modified the § 1292(b) standard in two respects, both of which increased the court of appeals' discretion whether to accept an interlocutory appeal from a class certification order: The court of appeals was given discretion to accept an appeal without a district court certification ruling, and the court of appeals' jurisdiction was not limited to orders that involved "a controlling question of law as to which there is a substantial ground for difference of opinion. . . . " Advisory Committee Notes to Rule 23(f). The net effect of these modifications was that Rule 23(f) vested the courts of appeals with broad and standardless discretion as to whether to grant review of class certification orders.

In the four and one-half years since Rule 23(f) went into effect, many courts of appeals have described the criteria they will use to guide themselves in the exercise of their discretion under Rule 23(f). Although relatively few class actions are filed in the D.C. Circuit, last year in *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98 (D.C. Cir. 2002), the Court of Appeals for the District of Columbia Circuit described the factors that would influence its discretion to accept an interlocutory appeal from a class certification order. Like every other court before it the D.C. Circuit announced that it would exercise its discretion flexibly, mindful of the considerations that underlie the rule, and the Advisory Committee Notes. "In our view," the court wrote, "interlocutory appellate review

under Rule 23(f) is properly directed by the guidance set forth in the advisory committee's note." *Id.* at 104. Nonetheless, agreeing with every other circuit court, the D.C. Circuit retained ample discretion to accept review "in special circumstances that neither the advisory committee's note nor the courts foresaw." *Id.* at 105.

Exercising its discretion in light of Rule 23(f)'s background and language, the Advisory Committee Notes, and its own recent writings, the D.C. Circuit chose not to review the district court's interlocutory order in this case. Given the broad and standardless discretion granted the courts of appeals by Rule 23(f), there is nothing in the D.C. Circuit's ruling that justifies this Court's review.

B. The Language, History and Advisory Committee Notes of Rule 23(f) Support the Conclusion that the Decision Whether to Grant Interlocutory Review is Committed to the Sole, Unfettered Discretion of the Courts of Appeals

Under congressionally-delegated authority, this Court has provided that a court of appeals may "in its discretion" permit an appeal from a district court's interlocutory order granting or denying class action certification. Fed. R. Civ. P. 23(f). By committing class certification review to the "discretion" of the courts of appeals, the rule provides no standard under which this Court, through the exercise of its own discretionary certiorari jurisdiction, can second-guess how the courts of appeals exercise that discretion. Furthermore, as discussed above, Rule 23(f) was created to enhance the discretion that the courts of appeals had exercised under § 1292(b), which (where the district court has certified an interlocutory order for appeal) authorizes

the appellate court to "deny the appeal for any reason. . . . " *Coopers & Lybrand*, 437 U.S. at 475.

The Advisory Committee Notes "provide a reliable source of insight into the meaning of a rule, especially when, as here, the rule was enacted precisely as the Advisory Committee proposed." *United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002). The Advisory Committee Notes to Rule 23(f) describe the appellate court's decision to accept an appeal as "unfettered" and subject to that court's "sole discretion" based on "any consideration that the court of appeals finds persuasive." Fed. R. Civ. P. 23(f) Advisory Committee Notes. The exercise of discretionary jurisdiction would not be "unfettered" if this Court were to second-guess how the appellate court exercised its discretion, applying a legal standard of this Court's making.

Moreover, in committing the decision whether to entertain interlocutory review to the "sole discretion" of the courts of appeals, Rule 23(f) was intended to allow a court of appeals to grant or deny review based upon the overall status of its docket, a factor which this Court is in no position to reassess. It is, thus, entirely understandable why the Advisory Committee Notes liken the discretion of a court of appeals under Rule 23(f) to "the discretion of the Supreme Court acting on a petition for certiorari." At its essence, the decision whether to grant a writ of certiorari is a highly individualistic determination as to whether the demands of this Court's docket and the need for clarifying the law make it desirable to review "a particular case at a particular time." *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950). Rule 23(f), likewise, expressly granted the courts of appeals "unfettered" discretion to

grant review based upon the desirability of reviewing a particular case at a particular point in time.

Because it would undermine the unfettered discretion that Rule 23(f) has given to the federal appellate courts to determine whether to accept an appeal thereunder, Sodexho's petition for a writ of certiorari to review the appellate court's Rule 23(f) denial should be denied.

C. There is No Circuit Conflict on Rule 23(f) Standards

Rule 23(f) contemplates that the circuit courts will evaluate each petition for interlocutory review on a case-by-case basis, without being confined to any hard-and-fast rules. In analogizing discretionary review under the new rule to this Court's certiorari jurisdiction, the Advisory Committee knew that "different reasons not infrequently move different members of the Court in concluding that a particular case at a particular time makes review undesirable." *Baltimore Radio Show,* 338 U.S. at 918; *see also Teague v. Lane*, 489 U.S. 288, 296 (1989) (noting variety of considerations behind certiorari denial). It is therefore not necessary or even desirable for each panel of each circuit to employ an identical standard in choosing whether to accept a petition for interlocutory review. Indeed, some circuits have not announced the criteria they would employ in acting on petitions for review, and there is

nothing in the rule that requires them to do so.[7] The rule-making process that culminated in Rule 23(f) concluded that each appellate court should have free reign to pass on interlocutory review petitions as that court sees fit, and that decision is entitled to "full respect." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 48 (1995). It is unnecessary and undesirable for this Court to grant certiorari to impose any single review standard on the courts of appeals.

In any event, there is no circuit conflict. Consistent with the Advisory Committee Notes, and beginning with *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832 (7th Cir. 1999), every circuit that has spoken to the issue has declined to adopt a "bright-line approach," or to issue a definitive "catalog of factors." *Id.* at 834. Last year, after surveying the decisions of the seven circuits (including the D.C. Circuit) that had already written on the issue, the Court of Appeals for the Sixth Circuit found that they all sounded the same theme: they "eschew any hard-and-fast test in favor of a broad discretion to evaluate relevant factors that weigh in favor of or against an interlocutory appeal." *In re Delta Air Lines*, 310 F.3d 953, 959 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 2252 (2003). The D.C. Circuit's *Lorazepam* opinion falls squarely within the consensus view of every circuit: "Interlocutory appellate review under Rule 23(f) is properly directed by the guidance set forth in the advisory committee's note," and any

[7] Federal Appellate Rules 5(c) and 32(c) treat petitions for interlocutory review as "other papers," just like petitions for rehearing, which are commonly determined by order, without any explanation.

further written guidance on the subject should be understood as "guidance, not a rigid test." 289 F.3d at 104, 105.

The D.C. Circuit's "further written guidance" as to when interlocutory review is appropriate is also consistent with that of other circuits. Sodexho inaccurately portrays the D.C. Circuit as having adopted a "death knell" rule for class certification orders, because the court has emphasized that end-of-the case review remains available for run-of-the mill challenges. Pet. at 12-13. But almost every circuit has said much the same thing. For example the Third Circuit, whose standards are said to present an "irreconcilable" conflict with the D.C. Circuit, has observed that "interlocutory review will generally prove unnecessary" if "allowing the litigation to follow its natural course would provide the moving party with an adequate remedy." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164-65 (3d Cir. 2001). The Eleventh Circuit has similarly cautioned against interlocutory review of class certification orders absent "a compelling need for resolution of the legal issue sooner, rather than later." *Prado-Steinman ex rel. Prado v. Bush*, 221 F.3d 1266, 1274 (11th Cir. 2000). The Seventh Circuit has agreed. In accepting review in *Blair v. Equifax*, the court of appeals emphasized that the certification order was likely to "evade review at the end of the case," because the pending action was one of multiple suits pending in various jurisdictions. 181 F.3d at 838.

Nor have the courts of appeals perceived any conflict among themselves. In *Newton v. Merrill Lynch*, the Third Circuit drew on the "thoughtful opinions of four other circuits, including the First Circuit." 259 F.3d at 163 n.3, 164 n.5. If there is anything in the First Circuit's guidance that is "highly restrictive" (Pet. at 14 n.9), it has escaped

the notice of many federal appellate judges.[8] Likewise, although the Petition seeks to portray the D.C. Circuit as unusually hostile to interlocutory review, the Sixth Circuit has read the D.C. Circuit's warning that interlocutory review is the exception, rather than the rule, as consistent with "the other courts before it." *In re Delta Air Lines,* 310 F.3d at 959. In fact far from having adopted a standard that is more restrictive than other circuits, the D.C. Circuit regards its criteria as being more flexible and less hostile to interlocutory review than that of the Seventh Circuit, the Petitioner's paragon of liberality. In *Lorazepam,* the D.C. Circuit observed that, where the district's order did not sound the "death knell" for the litigation, the Seventh Circuit would ignore entirely the likelihood that the district court's order was simply wrong. 289 F.3d at 105. In contrast the D.C. Circuit will not ignore district court error, at least where such error is "manifest." *Id.*[9]

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[8] Sodexho deals with this incongruity only by accusing the First Circuit of dissimulation: "Thus the First Circuit has adopted a highly restrictive standard closer to that of the D.C. Circuit, even though it professes affinity with the Seventh Circuit." Pet. at 18 n.9. And in Sodexho's warped world, the Second Circuit's guidance is "significantly more liberal" than the D.C. Circuit's, *id.* at 15 n.7 (citing *In re Visa-Check/Master Money Antitrust Litig,* 280 F.3d at 124, 132 n.2 (2d Cir. 2001), in which review was granted), but, nevertheless, is calculated to "shut the door on Rule 23(f) appeals." Pet. at 15 (citing *In re Sumitomo Copper Litig.,* 262 F.3d 134, 140 (2d Cir. 2001)).

[9] Contrary to Sodexho's claim (Pet. at 12), it is not at all certain that mandamus is available to correct erroneous certification orders. Indeed, Rule 23(f) was adopted in part because courts and scholars were "uneas[y]" that the use of mandamus to reverse class certification orders may have unduly "stretched the writ's traditionally restrictive parameters." *Newton v. Merrill Lynch,* 259 F.3d at 163.

In its attempt to manufacture a circuit conflict, Sodexho misuses statistics, as well as words. It is neither surprising nor significant that the Seventh Circuit has heard quite a few Rule 23(f) appeals, while the D.C. Circuit has not heard any. Only a handful of Rule 23(f) petitions have reached the D.C. Circuit, in contrast to the multitude of petitions in the Seventh Circuit and many other circuits. The disparity in petitions reflects the twenty-fold difference between the very few class actions of any sort that are pending in the D.C. Circuit (23) and the large number that are pending in the Seventh Circuit (453). Administrative Office of U.S. Courts, "Judicial Business of the United States Courts 2002," Table X-4, available at http://www.uscourts.gov/judbususc/judbus.html.[10] It should not take a statistician to recognize that meaningful comparisons between the circuits cannot be drawn from raw numbers of petition grants.

D. The Committee on Rules of Practice and Procedure Has Identified No Problems with Rule 23(f) that Require Fixing at This Time; Any Efforts to Circumscribe the Courts of Appeals' Discretion As to Whether to Review Class Certification Orders Should be Left to the Committee or to Congress

Sodexho's reliance on pending legislation to support its view that "de minimis review" under Rule 23(f) is

[10] According to the latest Administrative Office Report, as of September 30, 2002, only 0.5 percent of the 4,835 class actions pending in the federal courts were filed in the District of Columbia, and only three of these were civil rights employment cases. *Id.*

"unfair" (Pet. at 27), merely confirms that adjustment of the standards for interlocutory review is best left to Congress. After Sodexho filed the Petition, the House of Representatives approved H.R. 1115, sections 6 and 8 of which make any class certification order that is entered after this proposed law's enactment appealable as of right. If courts acting under the five-year-old legal regime of Rule 23(f) do not exercise their discretion sufficiently frequently, Congress can easily strip appellate courts of their discretion entirely, as H.R. 1115 would do, although even the House bill would not affect pending cases, like this one. Other than to change the result in this case, there is no reason for this Court to exercise its certiorari authority to craft a new standard to govern interlocutory review of class action orders.

Furthermore, this Court should consider that the Committee on Rules of Practice and Procedure of the Judicial Conference has opposed H.R. 1115. In a letter to the Chair of the House Committee on the Judiciary, Judge Scirica,[11] writing for the Rules Committee, reminded the House Committee that interlocutory appeals have generally been "disfavored because they cause unwarranted, expensive, and wasteful interruption;" that the Rules Committee was "unaware of any dissatisfaction expressed by the bench and bar with . . . Rule [23(f)];" and that "any consideration of amending it should be deferred until the bench and bar have had more experience with it." Letter from Judge Anthony J. Scirica to Honorable F. James

[11] Judge Scirica wrote *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3d Cir. 2001).

Sensenbrenner, Jr., *reprinted in* H.R. Rep. No. 108-144 at 127, 128 (2003) (Appendix A).

E. Even if the District Court's Partial Certification Order Presented Unsettled Issues of Class Action Law for D.C. Circuit Review, That Fact Provides No Reason for This Court to Review This Case

Sodexho dedicates a significant portion of its petition to an attempt to convince this Court that the district court's decision presents "fundamental, unsettled issues of class action law" worthy of D.C. Circuit review. Even if Sodexho's premise were correct, that premise would not justify certiorari review in this case. Each of the questions that Sodexho maintains is "unsettled" has been recently presented in petitions for certiorari to this Court, and this Court has not found any of them worthy of review. Sodexho posits a "conflict" between the Second Circuit and the Seventh Circuit (among others) on how closely courts should scrutinize conflicting expert opinions at the class certification stage. Pet. at 20-22. But this Court has recently denied certiorari to review these supposedly conflicting authorities. *Szabo v. Bridgeport Machs., Inc.*, 534 U.S. 951 (2001), *denying cert.*, 249 F.3d 672 (7th Cir. 2001); *Visa U.S.A., Inc. v. Walmart Stores, Inc.*, 536 U.S. 917 (2002), *denying cert.*, 280 F.2d 124 (2d Cir. 2001); *Metro-North Commuter R.R. Co. v. Norris*, 529 U.S. 1107 (2000), *denying cert.*, 191 F.3d 283 (2d Cir. 1999). *See also Northwest Airlines, Inc. v. Chase*, No. 02-1447 (June 6, 2003), *denying cert.*, 310 F.3d 953 (6th Cir. 2002). Likewise, although Sodexho claims a circuit split on when a class may be certified for liability purposes only (Pet. at 26), this Court did not find it necessary to resolve that

supposed "conflict" last year. *Metro-North Commuter R.R. Co. v. Robinson*, 535 U.S. 951 (2002), *denying cert.*, 267 F.3d 147 (2d Cir. 2001).[12] If these issues are "unsettled" – and we do not believe that they are unsettled – this Court has had and will continue to have ample opportunity to resolve them in cases which present these issues. This Court clearly has no need to follow the "roundabout" practice of compelling the D.C. Circuit to exercise its discretionary jurisdiction merely to set the stage for *possible* consideration by this Court of issues that *may possibly* be decided by the D.C. Circuit. The possible existence of unsettled issues of class action law that might justify D.C. Circuit review in no way supports this Court's grant of a Writ of Certiorari.

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[12] Even Sodexho does not claim a circuit conflict on its third "unsettled" issue – whether the existence of "decentralized" and "subjective" decisionmaking can constitute a discriminatory "policy." (Pet. at 23-26). It cites numerous *district* court decisions that it claims favor its view, but no appellate decision. And as noted in the text, this Court has recently denied certiorari in the *Caridad* case, which Sodexho describes as similar to its case. In our view, the district court's evaluation of all the case law as turning on the application of widely different factual patterns, rather than any fundamental doctrinal disagreement, is a fairer reading, and one that argues strongly against any discretionary review, either by an appellate court under Rule 23(f), or by this Court.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

KERRY ALAN SCANLON*
DAVID O. BICKART
STEVEN S. ROSENTHAL
T. MELINDAH BUSH
NICOLE J. BECTON
KAYE SCHOLER LLP
901 15th Street, N.W., Suite 1100
Washington, DC 20005
(202) 682-3500

Attorneys for Respondents

* *Counsel of Record*

APPENDIX A

COMMITTEE ON RULES OR PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES WASHINGTON, D.C. 20544

[Names Omitted In Printing]

May 12, 2003

Honorable F. James Sensenbrenner, Jr.
Chair
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-6216

Dear Chairman Sensenbrenner:

On March 26, 2003, the Director of the Administrative Office of the United States Courts, Leonidas Ralph Mecham, advised you of the March 18, 2003, Judicial Conference resolution recognizing "that the use of minimal diversity of citizenship may be appropriate to the maintenance of significant multi-state class action litigation in the federal courts, while continuing to oppose class action legislation that contains jurisdictional provisions that are similar to those in the bills introduced in the 106th and 107th Congresses." I am writing you about two specific provisions of the "Class Action Fairness Act of 2003" (H.R. 1115), which are not affected by the Judicial Conference resolution but which directly affect Rule 23 of the Federal Rules of Civil Procedure and are inconsistent with the Rules Enabling Act rulemaking process. (28 U.S.C. §§ 2072-2077.)

The first provision requires courts of appeals to rule on all interlocutory appeals of class-action certification decisions. It directly conflicts with Rule 23(f). The second provision imposes extensive plain-English requirements on settlement notice. It overlaps with amendments to Rule 23(c)(2)(B) approved by the Supreme Court that are presently before the Congress and will take effect on December 1, 2003, unless Congress acts otherwise. We respectfully request your committee to withdraw both provisions from H.R. 1115.

Party Entitled to Interlocutory Appeal of Class-Action Certification Decision

Section 6 of H.R. 1115 amends 28 U.S.C. § 1292(a) and would provide a party the right to an interlocutory appeal of a court's decision granting or denying class-action certification, if an appeal notice is filed within 10 days. The provision also stays all discovery and other proceedings during the pendency of the appeal.

Rule 23(f) was added by the Supreme Court in 1998. It provides courts of appeals with discretion to permit an appeal from an order granting or denying class-action certification. This provision also gives the district court and court of appeals discretion to stay proceedings in the district court pending outcome of the appeal.

Rule 23(f) was promulgated as a result of an exhaustive study of class-action practices by the Advisory Committee on Civil Rules. In its study of Rule 23, the committee considered hundreds of public comments, empirical studies, discussions at several major conferences of practitioners and judges well experienced in class actions, and statements given at public hearings at which

witnesses from major corporations, law firms, and law schools testified. The final Rule 23(f) was reviewed and approved by the Advisory Committee on Civil Rules, Committee on Rules of Practice and Procedure, Judicial Conference of the United States, and Supreme Court of the United States before it was transmitted to the United States Congress in accordance with the Rules Enabling Act.

Rule 23(f) made the necessary changes to reduce unwarranted procedural obstacles in obtaining appellate review of a district court's class-action certification decision. At the same time, however, it addressed concerns expressed by many judges and lawyers that interlocutory appeals are often unnecessary and would be abused as a procedural tactic to delay proceedings and unfairly increase litigation expense in many class actions. These concerns would be heightened by an automatic-stay provision, which could disrupt the district court's ability to manage the case. Providing an appeal as of right might tempt a party to file an interlocutory appeal solely for tactical reasons. Staying discovery and other proceedings in the district court would only increase the tactical advantages of filing an interlocutory appeal, particularly because resolution of the appeal may not occur for 12 to 18 months.

Interlocutory appeals in general have been traditionally disfavored because they can cause unwarranted, expensive, and wasteful interruptions. Rule 23(f) vests discretion in the appellate judges to permit interlocutory appeal of class-action certifications in appropriate cases and gives both the district court and the appellate court discretion to decide whether to stay proceedings pending

appeal. It has been working well, as evidenced by a significant and growing body of appellate law. The courts of appeals have announced detailed criteria to guide practitioners in deciding whether to seek leave to appeal. And the decisions that have granted leave to appeal are developing much-needed guidance on class action certification. The rules committees are unaware of any dissatisfaction expressed by the bench and bar with the rule. Moreover, the rule was only recently promulgated. Any consideration of amending it should be deferred until the bench and bar have had more experience with it.

Plain-English Settlement Notice Requirement

Section 3 of H.R. 1115 adds a new § 1715 to title 28, United States Code, prescribing detailed requirements governing the contents of proposed class-action settlement notices. On March 27, 2003, the Supreme Court transmitted to Congress amendments to Rule 23, which take effect on December 1, 2003, unless Congress acts otherwise. The amendments prescribe the contents of class-certification notices and also require that the court direct notice of a proposed settlement in a reasonable manner to all class members. The matters addressed by these amendments overlap to a certain extent with § 1715. We also believe that in its present form § 1715 may undermine the bill's stated objectives by requiring notices so elaborate that most class members will not even attempt to read them. Moreover, if H.R. 1115 is enacted without revision before December 1, 2003, reconciling any differences between the bill's notice provisions and the notice provisions in Rule 23 that are due to take effect in December 2003 may generate unnecessary confusion and litigation.

In the course of our Rule 23 study, we examined proposals that would have required extensive notices, but found that requiring detailed information in a class notice would be counterproductive, resulting in more complicated and unclear notices. It would defeat the goal of providing clearer and simpler information to putative class members. H.R. 1115's settlement-notice requirements are detailed and would likely encounter the same types of problems. Moreover, H.R. 1115's provisions are directed primarily at settlement notices, while the Rule 23 amendments address not only settlement notices but also the class-certification notice in which putative class members are first notified of the action and, when appropriate, given an opportunity to exercise their right to opt out of the class. The interface between Rule 23 and § 1715 is complicated by the growing number of "prepackaged" class actions that combine the first notice of class certification, including the opportunity to opt out, with notice of proposed settlement provisions.

At our request, the Federal Judicial Center worked with expert communications and linguistics consultants to develop sample plain-English class-action certification and settlement notices in products liability and securities cases. These notices are available on the Center's web site at <http://www.fjc.gov>. The illustrative forms were subjected to consumer testing by representative focus groups. The forms were well publicized and appeared in Law Week and BNA's Class Action Reporter. The Center's sample notices together with the Rule 23 amendments represent the culmination of many years of intensive study and work addressing the problems raised by unclear class-action notices. It is our belief that these models will significantly improve class-action notices.

At the same time, the rules committees do not consider that their class-action work has ended with the Rule 23 amendments. They will continue to monitor the status of class-action practice, including the use of class-action notices.

We recommend that section 6 and new § 1715 as added by H.R. 1115 be withdrawn. Thank you for considering our request.

Sincerely,

/s/ A. Scirica
Anthony J. Scirica
United States Court of Appeals

cc: Honorable John Conyers, Jr., Ranking Democrat
Members of the House Judiciary Committee
Honorable David F. Levi, Chair, Advisory Committee on Civil Rules

(3)

Supreme Court, U.S.
FILED
AUG 12 2003
OFFICE OF THE CLERK

No. 02-1731

IN THE

Supreme Court of the United States

SODEXHO MARRIOTT SERVICES, INC.,

Petitioner,

v.

CYNTHIA CARTER McREYNOLDS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

GEORGE W. JOHNSTON
TODD J. HORN*
MITCHELL Y. MIRVISS
VENABLE, BAETJER AND HOWARD, LLP
1800 Mercantile Bank & Trust Bldg.
Two Hopkins Plaza
Baltimore, Maryland 21201
(410) 244-7400

Attorneys for Petitioner

* *Counsel of Record*

182377

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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A. Overview

The Brief for Respondents in Opposition to Petition for Writ of Certiorari ("Response") submitted by Respondents Cynthia Carter McReynolds, *et al.*, fails at the most fundamental level: it ***never*** addresses the narrow legal issue presented by Sodexho's Petition – whether the D.C. Circuit abused its discretion by limiting its grant of interlocutory appeals under Fed. R. Civ. P. 23(f) to those rare class certification decisions that present (i) manifest error by the district court, (ii) an unsettled fundamental issue of law that is likely to evade end-of-the-case review, or (iii) a "death knell" impact terminating the case. Remarkably, the Response never mentions this stringent standard and thus makes no attempt to reconcile that standard's clear conflict with the unambiguous history of Rule 23(f) that interlocutory appellate review should be available for class action certification decisions raising important and unsettled issues of law.

Instead, Respondents proclaim that the circuit courts are vested with "standardless discretion" by Rule 23(f) (Response at 12) such that this Court should never review decisions to grant or deny appeal under that Rule. Respondents mince no words regarding this Court's purported lack of authority, stating unequivocally that "[t]he exercise of discretionary jurisdiction [by the circuit courts] would not be 'unfettered' if this Court were to second-guess how the appellate court exercised its discretion, applying a legal standard of this Court's making." (Response at 13).

The proposition that an appellate court has "standardless discretion" to reject, effectively, a rule of civil procedure approved by this Court, and that such a ruling lies beyond this Court's power to correct, is breathtaking in its scope. Respondents cite no precedents by this Court supporting this carve-out of a unique category of unreviewable appellate decisions, and Sodexho is unaware of any. If a circuit court abuses its discretion by electing to nullify Rule 23(f), this Court

has the unquestionable authority to act and to compel that court to apply the Rule.

Respondents' other arguments fare no better. For example, their contention that the D.C. Circuit's standard satisfies Rule 23(f) because the D.C. Circuit has stated that it would exercise its discretion "flexibly" (Response at 11) ignores the cold record of the D.C. Circuit decisions, which deny Rule 23(f) review in all cases and adopt standards that make it virtually impossible to obtain review absent "manifest error" or the rare circumstance where it can be proven that the certification decision will elude subsequent end-of-the-case review. For that same reason, Respondents' contention that no conflict exists among the circuits because the D.C. Circuit has stated that it, like the other circuits, allows for "flexibility" in its Rule 23(f) analysis (Response at 14-18), flies in the face of the D.C. Circuit decisions, which apply the three-part test so rigidly as to preclude any meaningful chance of appeal. *See, e.g., In re Veneman*, 309 F.3d 789, 794-96 (D.C. Cir. 2002).

Class certification is too significant an issue, often the case-deciding event, to apply normal prohibitions against interlocutory appeal. That fact – which led the Advisory Committee to promulgate Rule 23(f), this Court to adopt the Rule, and numerous circuit courts to grant appeals under the Rule – is ignored by Respondents. Their position, that circuit courts have absolute discretion to refuse to apply the Rule in all but the most extraordinary hypothetical circumstances, and that this Court has no role in correcting such a misinterpretation and misapplication of the Rule, should be rejected by the Court. The D.C. Circuit's antipathy to appeals under Rule 23(f) defeats the Rule's objective. This Court can and should review whether such a standard is permissible.

B. This Court Has Authority To Review The Circuits' Rule 23(f) Decisions

Respondents' principal contention, that this Court should not step in to correct the D.C. Circuit's erroneous interpretation of Rule 23, speaks for itself. This Court has a profound obligation to prevent a circuit court from using its discretion, however broad, to avoid implementing the Rule entirely. This principle cannot be swept aside, as Respondents would have it, under the guise of the circuit courts' broad discretion under Rule 23(f). The circuit courts have discretion to apply the Rule, not to defeat it. That discretion is abused if a circuit court refuses to accept Rule 23(f) appeals in all but the most extreme of cases.

This Court obviously retains authority to correct any abuse of discretion by the circuit courts, especially one that rests upon an erroneous interpretation of a rule of civil procedure. Nothing in the Rule, the Advisory Committee Notes, or the Advisory Committee Minutes, states that the Court will not exercise its customary role to oversee implementation of Rule 23(f) by the lower courts.[1] Where one or more circuits have abused their discretion by refusing to accept Rule 23(f) appeals in all but the most extreme of cases, this Court has the inherent authority to step in and require adherence to the Rule.

Respondents' argument regarding the horrors that would result from Supreme Court consideration of Rule 23(f) rests on a misstated and egregiously exaggerated account of Sodexho's Petition. According to Respondents, Sodexho seeks certiorari so that this Court could "impose [a] single review standard on

1. Respondents' contention that the "rulemaking process that culminated in Rule 23(f) concluded that each appellate court should have free reign to pass on interlocutory review petitions as that court sees fit" (Response at 15) conspicuously fails to cite to any such process. The Advisory Committee made clear that the circuit courts would be free to develop their own individual standards. It did not state that the circuit courts were free to establish standards so stringent that leave for appeal would never be granted.

the courts of appeals." (Response at 15). That is obviously not so. Certiorari is necessary here because the D.C. Circuit has adopted standards that, while paying lip-service to the Rule, effectively render the Rule useless. The myriad formulations of the other circuits, *see* Petition at 17-19, would not be affected.

Finally, Respondents' suggestion that judicial error in implementing Rule 23(f) should be left to Congress or to the Rules Committee is unsound. It is the province of this Court, not Congress or the Rules Committee, to resolve conflicts among the circuits involving erroneous interpretations of rules of civil procedure.[2]

C. The D.C. Circuit's Standard Conflicts With Other Circuits And Negates Rule 23(f)

Respondents ignore the D.C. Circuit's actual standard for good reason. By limiting appeals under Rule 23(f) to cases of manifest error or where there is clear proof that the class certification decision will evade end-of-the case review or sound the death knell of the litigation, the D.C. Circuit has set the bar for Rule 23(f) appeals so high that it is virtually impossible to satisfy. To date, no circuit court has granted appellate review of a certification decision under these standards, except under a much more liberal interpretation of the test for determining the

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2. The fact that Congress is considering a bill to eliminate the circuit courts' discretion to deny Rule 23(f) appeals – not surprisingly, the bill is opposed by the Rules Committee – only supports the need for the Court's intervention here. Decisions such as that of the D.C. Circuit in this case are fueling the preference of many in Congress regarding the need for an automatic right of interlocutory appeal of class certification decisions. If the circuit courts are to retain their discretion in deciding whether to hear such appeals, this Court should make clear that at least meritorious appeals presenting important unsettled issues of class action law may and will be heard.

likelihood of a certification decision evading end-of-the-case review.[3]

Indeed, Respondents are able to argue that that no conflict exists among the circuit courts only by ignoring the D.C. Circuit's standard. Rather than address that actual standard, Respondents focus on the fact that the D.C. Circuit describes its three-part test as "'guidance, not a rigid test'" and allows for considerable flexibility beyond any "bright-line" test. (Response at 16 (quoting *In re: Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 104, 105 (D.C. Cir. 2002)). Any such "flexibility" is purely cosmetic. In *Lorazepam*, the D.C. Circuit made clear that "Rule 23(f) review should be granted rarely where a case does not fall within one of these three categories," allowing only for vague, unforeseeable "special circumstances." *Id.* at 105-06. A subsequent decision, *In re Veneman*, 309 F.3d 789, 794-96 (D.C. Cir. 2002), leaves no doubt that this "flexibility" is a chimera. In *Veneman*, the D.C. Circuit acknowledged that petitioners *had* raised extremely important and novel issues regarding a district court's partial certification of a class without adequate consideration of Rule 23(b). Nonetheless, the circuit court denied review of the certification decision because of a perceived failure to specify Rule 23(c)(4) in the petition. *See id.* The message of *Lorazepam* and *Veneman*

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3. *See, e.g., In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002) ("Permitting appellate review before class certification can precipitate such a settlement is a principal function of Rule 23(f)."); *Isaacs v. Sprint Corp.*, 261 F.3d 679, 681 (7th Cir. 2001) (explaining that a "compelling case" for Rule 23(f) appeal occurs when the "the grant of a class status places undue pressure on a defendant to settle"); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001) (concluding that interlocutory appeal is warranted because "certifying the class may place an unwarranted or hydraulic pressure to settle on defendants"); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) (explaining that an order certifying a large class satisfies Rule 23(f) by placing a defendant in a "bet-your company decision").

is clear. In the D.C. Circuit, the door is shut on Rule 23(f) appeals.

As for the other circuits, Respondents' contention that the D.C. Circuit standard is no less liberal than that of the Third and Seventh Circuits (Response at 16-17) defies any legitimate case analysis. In the Third Circuit, interlocutory appellate review is deemed appropriate to correct "an erroneous ruling," to "facilitate development of the law on class certification," or to prevent excessive pressure on a defendant to settle. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001). The Seventh Circuit does not permit review simply to correct an error, but it does grant interlocutory appeal where the size of the proposed class puts inordinate settlement pressure on the defendant, the district court's decision is "problematic," or the Rule 23(f) petition raises "important legal principles" that "have evaded attention by appellate courts." *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001). *Accord, In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-16 (7th Cir. 2002) (holding that where aggregating claims

> makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable – and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims[,] [p]ermitting appellate review before class certification can precipitate such a settlement is a principal function of Rule 23(f). . . . Another function is permitting appellate review of important legal issues that otherwise might prove elusive.);

Isaacs v. Sprint Corp., 261 F.3d 679, 681 (7th Cir. 2001) (granting Rule 23(f) appeal because certification decision placed "enormous" pressure on defendant to settle).

It is difficult to see a clearer conflict than in these decisions. None of the Third and Seventh Circuit factors, individually or

collectively, would permit interlocutory review in the D.C. Circuit, which expressly affirmed in *Veneman* that petitions raising even the most significant of Rule 23 issues will be denied if they cannot be proven to evade end-of-the-case review. *See Veneman*, 309 F.3d at 794-96. No honest reading of *Szabo*, *Newton*, and their progeny could possibly view them as even remotely consonant with the D.C. Circuit rulings in *Lorazepam* and *Veneman*.[4]

Respondents also fail to explain the tangible proof of this clear conflict among the circuit courts – the fact that the D.C. Circuit has denied every Rule 23(f) petition it has ever reviewed, in stark contrast to the majority of such appeals that have been granted by the other circuit courts. *See* Petition at 13-15 n.6. This emphatic door-slamming on Rule 23(f) appeals is not a mere statistical anomaly, as Respondents would have it.

4. Instead of considering the holdings of those cases, Respondents point to insignificant dicta, such as the fact that all of the circuit court decisions on Rule 23(f) use the Seventh Circuit's decision in *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832 (7th Cir. 1999), the first published opinion on Rule 23(f), as the starting point of their analyses. *See* Response at 16. Those statements mean little given the enormous gulf between the D.C. and Seventh Circuits that subsequently developed. As for Respondents' hyperbolic contention that the Petition is "warped" because it pointed out incongruities in decisions by the First and Second Circuits, *see* Response at 17 n.8, those incongruities speak for themselves. While stating that it was in accord with *Blair*, the First Circuit made a seemingly small but all-critical change: Rule 23(f) petitions presenting fundamental issues of law will not warrant interlocutory review unless they also are "likely to escape effective review." *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000). Conversely, the Second Circuit apparently dropped that requirement from its standards. *Contrast In re Sumitomo Copper Litig.*, 262 F.3d 134, 140 (2d Cir. 2001) (the source for the D.C. Circuit's three-part test in *Lorazepam*) *with In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 132 n.3 (2d Cir. 2001) (allowing interlocutory appeal under Rule 23(f) to address "a legal question about which there is a compelling need for immediate resolution" without requiring petitioner to demonstrate that that issue was likely to evade end-of-the-case review).

The six known denials of Rule 23(f) petitions by the D.C. Circuit (Petition at 13) ***exceed*** the number of known denials in the Third, Seventh, or Eleventh Circuits, even though, as Respondents contend, there may be as much as a twenty-fold difference in the number of class actions pending in the D.C. and Seventh Circuits.[5] (Response at 18). In the face of this evidence, Respondents' contention that the D.C. Circuit's standard is at least as liberal as that in the Seventh Circuit strains all credulity.

Finally, Respondents fail to reconcile the D.C. Circuit's standard with the clear history of the Advisory Committee's development of Rule 23(f). While citing the Committee's Note with regard to the broad discretion accorded to the circuit courts, Respondents ignore the Note's statement that permission to appeal under Rule 23(f) would most likely be granted when a certification decision "turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation." Fed. R. Civ. P. 23(f) Advisory Committee Note. By abandoning either test and instead adopting standards that effectively preclude Rule 23(f) review, the D.C. Circuit clearly abused its discretion.

D. Sodexho's Rule 23(f) Appeal Merits Review By The D.C. Circuit

In briefly addressing the merits of Sodexho's Rule 23(f) Petition, Respondents do not dispute Sodexho's contentions that (1) the district court's decision contradicts numerous other district court and circuit decisions; (2) the D.C. Circuit has never addressed these issues; and (3) significant differences exist among other circuit courts. Instead, Respondents make the feeble argument that, because this Court has denied certiorari in

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5. This fact alone casts considerable doubt on the D.C. Circuit's antipathy to interlocutory appeals under Rule 23(f). In *Lorazepam*, 289 F.3d at 105-06, the D.C. Circuit identified "[t]he sheer number of class actions" as a foremost reason for narrowing the scope of Rule 23(f) review. Under Respondents' statistical analysis, that floodgates concern is wholly unwarranted.

some of these cases, the issues did not warrant review by the D.C. Circuit, and certiorari is not warranted now. *See* Response at 20-21. Again, Respondents confuse the purpose of Sodexho's Petition. Certiorari is needed to prevent circuit courts from defying Rule 23(f) by refusing to permit interlocutory appeals, not to address the merits of Sodexho's Rule 23(f) petition. The latter issues are germane only to demonstrate that the petition warrants Rule 23(f) review.

Respondents' lengthy diatribe repeating their factual allegations against Sodexho (Response at 1-9) similarly illustrates the weakness of their Response. The first half of the Response is largely a trial brief, alleging acts of discrimination that have little bearing on Sodexho's Rule 23(f) petition. Too many facts are bludgeoned by Respondents to address here. Suffice it to say, there is ample evidence to the contrary; some facts are just plain wrong or misleading (*e.g.*, citing statements that disparage Sodexho's practices without attributing them as assertions by the plaintiffs); and other facts are just exaggerated, such as the reliance on an "expert" industrial psychologist's opinion when that opinion was so flimsy that the district court did not even credit it in its certification decision.

E. Conclusion

The decision to certify a putative class often constitutes the single most significant event in deciding the outcome of a class action lawsuit, as commentators and many in Congress have recognized. Fed. R. Civ. P. 23(f) was promulgated so that significant class certification decisions could be appealed and reviewed before trial to ensure uniformity of decisions, to prevent significant errors, and to avoid imposing unwarranted settlement pressures on defendants through erroneous certifications. This Court should grant a Writ of Certiorari to ensure that the circuit courts are not permitted to bypass this vital safeguard.

Respectfully submitted,

GEORGE W. JOHNSTON
TODD J. HORN*
MITCHELL Y. MIRVISS
VENABLE, BAETJER AND HOWARD, LLP
1800 Mercantile Bank & Trust Bldg.
Two Hopkins Plaza
Baltimore, Maryland 21201
(410) 244-7400

Attorneys for Petitioner

* *Counsel of Record*